DOCKET

No. 08-108
Title: Ignacio Carlos Flores-Figueroa, Petitioner
v.
United States
Docketed: July 25, 2008
Lower Ct: United States Court of Appeals for the Eighth Circuit
Case Nos.: (07-2871)
Decision Date: April 23, 2008
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jul 22 2008	Petition for a writ of certiorari filed. (Response due August 25, 2008)
Aug 19 2008	Order extending time to file response to petition to and including September 24, 2008.
Sep 19 2008	Brief of respondent United States filed.
Sep 30 2008	Reply of petitioner Ignacio Carlos Flores-Figueroa filed. (Distributed)
Oct 1 2008	DISTRIBUTED for Conference of October 17, 2008.
Oct 20 2008	Petition GRANTED.
Oct 23 2008	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including December 15, 2008.
Oct 23 2008	The time within which to file respondent's brief on the merits is extended to and including January 23, 2009.
Dec 2 2008	Motion to dispense with printing the joint appendix filed by petitioner Ignacio Carlos Flores-Figueroa.
Dec 8 2008	SET FOR ARGUMENT ON Wednesday, February 25, 2009.
Dec 12 2008	Consent to the filing of amicus briefs, in support of either party or neither party, received from counsel for the petitioner.
Dec 15 2008	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Dec 15 2008	Brief of petitioner Ignacio Carlos Flores-Figueroa filed.
Dec 19 2008	Brief amici curiae of Advocates for Human Rights, et al. filed.
Dec 22 2008	Brief amici curiae of Electronic Privacy Information Center, et al. filed.
Dec 22 2008	Brief amicus curiae of Professors of Linguistics in support of neither party filed.
Dec 22 2008	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Dec 22 2008	Brief amicus curiae of Professors of Criminal Law filed.
Dec 22 2008	Brief amici curiae of Mexican American Legal Defense and Educational Fund, et al. filed.
Jan 7 2009	Record received from the U.S.C.A. for the 8th Circuit. (1 envelope)
Jan 9 2009	CIRCULATED.
Jan 22 2009	Record for the U.S.D.C. for the Southern District of Iowa is Electronically filed.
Jan 23 2009	Brief of respondent United States filed. (Distributed.)
Jan 28 2009	Motion of Professors of Linguistics in support of neither party for leave to participate in oral argument as amici curiae and for divided argument filed.
Jan 30 2009	Brief amici curiae of Maryland Crime Victims' Resource Center, Inc., et al. filed. (Distributed)
Feb 17 2009	Reply of petitioners Ignacio Carlos Flores-Figueroa filed.
Feb 20 2009	Motion of Professors of Linguistics in support of neither party for leave to participate in

oral argument as amici curiae and for divided argument DENIED.

Feb 25 2009 Argued. For petitioner: Kevin K. Russell, Bethesda, Md. For respondent: Toby J. Heytens, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

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PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

IGNACIO FLORES-FIGUEROA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, to prove aggravated identity theft under 18 U.S.C. § 1028A(a)(1), the Government must show that the defendant knew that the means of identification he used belonged to another person.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

PETITION FOR A WRIT OF CERTIORARI 1

OPINION BELOW 1

JURISDICTION 1

RELEVANT STATUTORY PROVISION 1

STATEMENT 2

REASONS FOR GRANTING THE WRIT 7

I. Six Courts Of Appeals Are Evenly Divided Over The Scope Of The Mens Rea Requirement Of 18 U.S.C. § 1028A(a)(1). 8

II. A Defendant Does Not Knowingly Commit Aggravated Identity Theft Unless He Knows That The Means Of Identification He Is Using Belongs To Another Person 16

CONCLUSION 28

APPENDIX

Court of Appeals Decision 1a

Judgment 4a

TABLE OF AUTHORITIES

Cases

Bell v. United States,
349 U.S. 81 (1955) 27

Liparota v. United States,
471 U.S. 419 (1985) ..... *passim*

Moskal v. United States,
498 U.S. 103 (1990) 21

United States v. Godin,
476 F. Supp. 2d 1 (D. Me. 2007) 20

United States v. Godin, No. 07-2332,
2008 WL 2780646 (1st Cir. July 18, 2008) .... *passim*

United States v. Hurt,
527 F.3d 1347 (D.C. Cir. 2008) 24

United States v. Hurtado,
508 F.3d 603 (11th Cir. 2007) (per curiam),
cert. denied, 128 S. Ct. 2903 (2008) ..... *passim*

United States v. Mendoza-Gonzalez,
520 F.3d 912 (8th Cir. 2008), *petition for cert. filed* (U.S. July 15, 2008) (No. 08-5316) ..... *passim*

United States v. Miranda-Lopez,
No. 07-50123, 2008 WL 2762392
(9th Cir. July 17, 2008) 8, 9, 10, 13

United States v. Montejo,
442 F.3d 213 (4th Cir. 2006) ..... *passim*

United States v. Santos,
128 S. Ct. 2020 (2008) 27

United States v. Villanueva-Sotelo,
515 F.3d 1234 (D.C. Cir. 2008) ..... *passim*

United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) 20

Statutes

7 U.S.C. § 2024(b)(1) 17, 19
8 U.S.C. § 1325 4
18 U.S.C. § 1028A ..... *passim*
§ 1028A(a)(1) ..... *passim*
§ 1028A(a)(2) 22, 23
§ 1028A(c)(1) 14
§ 1028A(c)(2) 14
§ 1028A(c)(3) 14
§ 1028A(c)(7) 14
18 U.S.C. § 1546 ..... 4, 25
21 U.S.C. § 841(a)(1) 19
Identity Theft Penalty Enhancement Act, H.R. 1731, 108th Cong. (2004) 24

Other Authorities

Black's Law Dictionary (8th ed. 2004) 24
Model Penal Code (1985) 9, 22
Securing Electronic Personal Data: Striking a Balance Between Privacy and Commercial and Governmental Use, Before the Subcomm. on Corrections and Rehabilitation of the S. Comm on the Judiciary, 109th Cong. (2005) 14
W. LaFave, *Substantive Criminal Law* (2d ed. 2003) 18, 24

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ignacio Flores-Figueroa respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. 1a-3a), is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 2008. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

In relevant part, 18 U.S.C. § 1028A provides:

§ 1028A. Aggravated identity theft

(a) Offenses.--

(1) In general.—Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

STATEMENT

18 U.S.C. § 1028A(a)(1) imposes a mandatory consecutive two-year sentence enhancement on anyone who, during and in relation to certain enumerated offenses, "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person. . . ."[1] In this case,

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[1] The enumerated offenses are listed in 18 U.S.C. § 1028A(c) and include violations of:

> (1) section 641 (relating to theft of public money, property, or rewards[1]), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), or section 664 (relating to theft from employee benefit plans);
>
> (2) section 911 (relating to false personation of citizenship);
>
> (3) section 922 (a)(6) (relating to false statements in connection with the acquisition of a firearm);
>
> (4) any provision contained in this chapter (relating to fraud and false statements), other than this section or section 1028(a)(7);
>
> (5) any provision contained in chapter 63 (relating to mail, bank, and wire fraud);
>
> (6) any provision contained in chapter 69 (relating to nationality and citizenship).
>
> (7) any provision contained in chapter 75 (relating to passports and visas);
>
> (8) section 523 of the Gramm-Leach-Bliley Act (15 U.S.C. 6823) (relating to obtaining customer information by false pretenses);
>
> (9) section 243 or 266 of the Immigration and Nationality Act (8 U.S.C. 1253 and 1306) (relating to willfully failing to leave the United States after

petitioner acknowledged using, without lawful authority, false Social Security and Alien Registration numbers in order to obtain employment. However, he denied (without contradiction by the Government) knowing that the false identification numbers in fact belonged to some other actual person, as opposed to simply being fabricated numbers never issued by the Government to a real person.

The question presented by this petition, upon which the courts of appeals are extensively divided, is whether a defendant "*knowingly* . . . uses, without lawful authority, a means of identification of another person" within the meaning of Section 1028A(a)(1) when he does not know that the identification he is using in fact belongs to another person.

1. On April 17, 2000, petitioner, a citizen of Mexico, used a false Social Security number and Resident Alien card to obtain employment at a steel company. U.S. C.A. Br. 3. At the time, petitioner used the name Horatio Ramirez, but neither the

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deportation and creating a counterfeit alien registration card);

(10) any provision contained in chapter 8 of title II of the Immigration and Nationality Act (8 U.S.C. 1321 et seq.) (relating to various immigration offenses); or

(11) section 208, 811, 1107(b), 1128B(a), or 1632 of the Social Security Act (42 U.S.C. 408, 1011, 1307(b), 1320a–7b(a), and 1383a) (relating to false statements relating to programs under the Act).

[1] So in original. Probably should be "records".

Social Security number nor the Resident Alien card had been issued to anyone of that name. *Id.* at 1, 5. In fact, the Social Security number was invalid. *Id.* at 5.[2]

In 2006, petitioner desired to begin working under his real name. He presented his employer with a new Social Security number, purportedly issued under petitioner's name, and a Permanent Resident card with his name and a registration number. U.S. C.A. Br. 3. Both documents were forgeries purchased by petitioner from an individual in Chicago. *Id.* at 5-6. Suspicious, the company's owner reported the request to U.S. Immigrations and Customs Enforcement (ICE).

The ICE investigation revealed that none of the documents were issued to either petitioner or to his former alias, Horatio Ramirez. Instead, the Social Security card bearing petitioner's name used a number issued to a minor. U.S. C.A. Br. 5. The Permanent Resident card likewise bore a number that was issued to someone else. *Id.*[3]

3. In early 2006, a federal grand jury indicted petitioner on two counts of Misuse of an Immigration Document, in violation of 18 U.S.C. § 1546, and one count of Illegal Entry, in violation of 8 U.S.C. § 1325. The grand jury also indicted petitioner on two counts of Aggravated Identity Theft, in violation of 18 U.S.C.

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[2] The record does not disclose whether the Resident Alien card number was valid or not.

[3] The record does not disclose any further details about the persons whose Social Security and Permanent Resident numbers were used on the cards bearing petitioner's name.

§ 1028A, arising from his use of the Social Security and Permanent Resident cards purportedly issued in his own name.[4] Pet. App. 2a; U.S. C.A. Br. 1. Petitioner pled guilty to both counts of Misuse of an Immigration Document and the sole count of Illegal Entry. Petitioner pled not guilty to the two counts of Aggravated Identity Theft and consented to a bench trial. U.S. C.A. Br. 1.

At trial, petitioner admitted that the documents were never issued to him, but testified that he purchased the identification documents without any knowledge that the numbers they bore belonged to real people. U.S. C.A. Br. 5.

At the close of evidence, petitioner argued that the Government had failed to prove aggravated identity theft because it had not presented any evidence to contradict his testimony that he did not know that the means of identification he had used belonged to "another person," as required by Section 1028A(a)(1). Pet. App. 2a. The district court rejected petitioner's construction of the statute, agreeing with the Government that no such proof was required. Accordingly, the court found petitioner guilty and sentenced him to seventy-five months imprisonment, twenty-four of which were the result of the Section 1028A enhancement. *Id.* at 2a-3a.

---

[4] Because the original Social Security card bearing the name Horatio Ramirez did not, in fact, belong to "another person," as required by Section 1028A(a)(1), petitioner was not charged with Aggravated Identity Theft with respect to that document. Likewise, petitioner was not charged with Aggravated Identity Theft with respect to the original false Resident Alien card.

4. Petitioner appealed his conviction to the Eighth Circuit, renewing his argument that § 1028A requires proof that the defendant knew that the identification he used belongs to another person. Pet. App. 3a. The court of appeals summarily affirmed, explaining that it had recently "resolved this issue and determined that under the plain language of the statute, 'knowingly' modified only the verbs 'transfers, possesses, or uses,' and not the phrase 'of another person.'" *Id.* (citing *United States v. Mendoza-Gonzalez*, 520 F.3d 912 (8th Cir. 2008), *petition for cert. filed* (U.S. July 15, 2008) (No. 08-5316)).

In that prior decision, the Eighth Circuit acknowledged that its construction of the statute, while consistent with the law of the Fourth and Eleventh Circuits, conflicts with a decision of the D.C. Circuit. *Mendoza-Gonzalez*, 520 F.3d at 915-16 (citing *United States v. Villanueva-Sotelo*, 515 F.3d 1234 (D.C. Cir. 2008); *United States v. Hurtado*, 508 F.3d 603 (11th Cir. 2007) (per curiam), *cert. denied*, 128 S. Ct. 2903 (2008); *United States v. Montejo*, 442 F.3d 213 (4th Cir. 2006)).

5. This petition followed.

REASONS FOR GRANTING THE WRIT

This case presents the Court an opportunity to resolve an ever-widening circuit split on an important and recurring question of federal law. Indeed, in the five days prior to the filing of this petition, the division over the mens rea requirement of 18 U.S.C. § 1028A(a)(1), has grown from the 3-1 split acknowledged by the Eighth Circuit at the time of petitioner's appeal to a 3-3 conflict that shows no sign of abating.

Three courts of appeals now hold that "aggravated identity theft" under Section 1028A(a)(1) occurs only when the defendant knows that the means of identification he is using in fact belongs to another person. Three other circuits hold the opposite. This division of authority is considered, entrenched, and untenable. The question presented arises frequently, particularly in the context of immigration prosecutions when, as in this case, a defendant seeking employment obtains a false Social Security number without knowing whether the number is simply made up and belongs to no one, or in fact matches the number assigned by the Government to another person. The continued disparate application of the severe penalties of Section 1028A(a)(1) to similarly situated defendants should not endure. Accordingly, this Court should grant certiorari in this case to resolve the conflict and restore uniformity to this important area of federal law.

I. Six Courts Of Appeals Are Evenly Divided Over The Scope Of The Mens Rea Requirement Of 18 U.S.C. § 1028A(a)(1).

1. In the past two years, six courts of appeals have considered the mens rea requirement of Section 1028A(a)(1), dividing evenly into two diametrically opposed camps.

First, Ninth, and D.C. Circuits. The First, Ninth, and D.C. Circuits have each held that the knowledge requirement of Section 1028A(a)(1) extends to the "of another person" element of the offense, requiring the Government to prove that the defendant did not simply invent a false identification number in cases such as this, but knew that he was using the means of identification belonging to another actual person. *See United States v. Godin*, No. 07-2332, 2008 WL 2780646, at *1 (1st Cir. July 18, 2008) ("[W]e hold that the 'knowingly' *mens rea* requirement extends to 'of another person.' In other words, to obtain a conviction under § 1028A(a)(1), the government must prove that the defendant knew that the means of identification transferred, possessed, or used during the commission of an enumerated felony belonged to another person."); *United States v. Miranda-Lopez*, No. 07-50123, 2008 WL 2762392, at *5 (9th Cir. July 17, 2008) ("[W]e thus hold that the government was required to prove that Miranda-Lopez knew that the identification belonged to another person."); *United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1235 (D.C. Cir. 2008) ("[W]e hold that section 1028A(a)(1)'s mens rea requirement extends to the phrase 'of another person,' meaning that the government must prove the defendant actually knew

the identification in question belonged to someone else.").

These courts have rejected the assertion that the word "knowingly" should be read as modifying only the verbs that follow it. The D.C. Circuit, for example, has pointed out that "the Model Penal Code adopts as a general principle of construction a rule under which, absent evidence to the contrary, the mens rea requirement encompasses all material elements of an offense." *Villanueva-Sotelo*, 515 F.3d at 1239 (citing *Model Penal Code* § 2.02(4) (1985)). *See also Godin*, 2008 WL 2780646, at *4 ("In criminal statutes, adverbs that are also *mens rea* requirements frequently extend to non-verbs.") (collecting examples). In fact, the D.C. Circuit observed that even the Government admitted that the knowledge requirement of Section 1028A(a)(1) extends beyond the verbs in the provision, requiring proof at the very least that the defendant knew that what he was using was a "means of identification." *Villanueva-Sotelo*, 515 F.3d at 1238.

Whether the knowledge requirement extends all the way to the phrase "of another person," these three circuits have found, is a question upon which the statutory text is ambiguous. *See Godin*, 2008 WL 2780646, at *5; *Miranda-Lopez*, 2008 WL 2762392, at *4; *Villanueva-Sotelo*, 515 F.3d at 1243. That conclusion, these courts believe, is supported by this Court's decision in *Liparota v. United States*, 471 U.S. 419 (1985), which found that a similar formulation was "ambiguous" "[a]s a matter of grammar" because "it is not at all clear how far down the sentence the word 'knowingly' is intended to travel." *Liparota*, 471 U.S. at 424-25 n.7; *see*

Villanueva-Sotelo, 515 F.3d at 1241; *Godin*, 2008 WL 2780646, at *5; *Miranda-Lopez*, 2008 WL 2762392, at *3-*4.

Turning to other indicia of legislative intent, these circuits have noted that the structure, title ("Aggravated identity theft"), and basic purposes of the provision (as illustrated in the legislative history) either undermine the Government's reading or do not resolve the textual ambiguity. The D.C. Circuit has concluded that these sources show that the essence of the crime defined in Section 1028A(a)(1) is intentional theft and that when a defendant simply acquires an identification number (like a made-up Social Security number) that fortuitously belongs to someone else, "it is odd – and borders on the absurd – to call what [the defendant] did 'theft.'" 515 F.3d at 1246 (citation omitted). The First and Ninth Circuits have agreed that the legislative history tends to support this view, but ultimately concluded that the history as a whole was inconclusive. *Godin*, 2008 WL 2780646, at *7-*8; *Miranda-Lopez*, 2008 WL 2762392,. at *4.

Because they found the text of the statute ambiguous – and concluded that the structure, history, and purposes of the provision failed to resolve the ambiguity – the First and Ninth Circuits applied the rule of lenity to decide the statutory question in favor of the defendant. *Godin*, 2008 WL 2780646, at *8; *Miranda-Lopez*, 2008 WL 2762392 at *5. Although the D.C. Circuit reached the same conclusion based on its reading of the text in light of the statute's structure, purposes, and legislative history, *Villanueva-Sotelo*, 515 F.3d at 1246, it also stated that "if we harbored any doubt about this . . .

we would turn to the rule of lenity to resolve the dispute," *id.* (citation and internal quotation marks omitted).

Fourth, Eighth, and Eleventh Circuits. Three other circuits have considered the same essential arguments and reached the opposite conclusion. *See United States v. Mendoza-Gonzalez*, 520 F.3d 912, 915 (8th Cir. 2008) (holding that "the Government was not required to prove that Mendoza-Gonzalez knew that [the person whose name and social security number he used] was a real person to prove he violated § 1028A(a)(1)"), *petition for cert. filed*, (U.S. July 15, 2008) (No. 08-5316); *United States v. Hurtado*, 508 F.3d 603, 610 (11th Cir. 2007) (per curiam) (holding that that "§ 1028A(a)(1) [does] not require the government to prove that [a defendant] knew that the means of identification he possessed and used belonged to another actual person"), *cert. denied*, 128 S. Ct. 2903 (2008); *United States v. Montejo*, 442 F.3d 213, 217 (4th Cir. 2006) (holding that "the defendant need not be aware of the actual assignment of the [identification] numbers to an individual to have violated the statute").

These courts have reasoned that the adverb "knowingly" is most sensibly read as modifying solely the verbs that follow – "transfers, possesses, or uses" – and not the broader object of those verbs (*i.e.*, "means of identification of another person"). *See Mendoza-Gonzalez*, 520 F.3d at 915; *Hurtado*, 508 F.3d at 609; *Montejo*, 442 F.3d at 215. The courts have acknowledged that this Court has given a broader reach to the knowingness requirement of similarly structured statutory provisions in cases like *Liparota*. But they distinguish such cases as resting

on a concern, absent here, about criminalizing otherwise innocent conduct. *See Mendoza-Gonzalez*, 520 F.3d at 917; *Hurtado*, 508 F.3d at 609-10; *Montejo*, 442 F.3d at 216.

All three circuits thus have found the statute unambiguous. *See Mendoza-Gonzalez*, 520 F.3d 916; *Hurtado*, 508 F.3d at 610 n.8; *Montejo*, 442 F.3d at 217. Thus, none relies on legislative history, although the Eighth Circuit has indicated that it would view that history as supporting its reading of the text. *See Mendoza-Gonzalez*, 520 F.3d at 916-17. And because they found the text of the statute clear, the Fourth and Eighth Circuits have declined to apply the rule of lenity to construe the statute in a manner more favorable to defendants. *Hurtado*, 508 F.3d at 610 n.8; *Montejo*, 442 F.3d at 217.

2. Writing separately in *Godin*, Judge Lynch persuasively argued that the time has come for this Court to resolve the circuit conflict:

> It would be beneficial if the Supreme Court resolved the mens rea issue. The circuit conflict is certainly ripe. And there are a large number of district court opinions on the issue. The issue is important and affects a large number of cases and a large number of defendants. For each of those defendants, an additional mandatory two-year sentence makes a great deal of difference.

2008 WL 2780646, at * 10 (Lynch, C.J., concurring).

This Court should heed Judge Lynch's call. The circuit conflict is considered, mature, and ripe for resolution. Each of the six circuits has given the question presented extensive, thoughtful consideration. The courts have acknowledged each

other's holdings and reasoning, but have been unable to agree on the meaning of the statute.[5] As a result, there is no reasonable prospect that the division will be resolved without this Court's intervention. Indeed, two of the circuits have denied petitions for rehearing en banc, one on each side of the split. *See United States v. Villanueva-Sotelo*, 515 F.3d 1234 (D.C. Cir. 2008), *reh'g en banc denied*, (June 13, 2008); *United States v. Mendoza-Gonzalez*, 520 F.3d 912, 915 (8th Cir. 2008), *reh'g en banc denied*, (May 1, 2008).

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[5] *See Godin*, 2008 WL 2780646, at * 3 (First Circuit noting that the "circuits are divided on the issue" and citing the decisions of the Fourth, Eighth, Eleventh, and D.C. Circuits); *id.* at *4 (explaining basis for its disagreement with the Fourth, Eighth, and Eleventh Circuits); *id.* at *6-*8 (disagreeing with the D.C. Circuit's conclusion that the provision's structure, title, and legislative history resolve the ambiguity); *Miranda-Lopez*, 2008 WL 2762392, at *4 (Ninth Circuit acknowledging split between D.C. Circuit and the Fourth, Eighth, and Eleventh Circuits, and declaring that "we follow the D.C. Circuit's reasoning"); *Mendoza-Gonzalez*, 520 F.3d at 915-16 (Eighth Circuit noting decisions of the Fourth, Eleventh, and D.C. Circuits); *id.* at 916 ("We acknowledge that we have reached a different conclusion than the D.C. Circuit" and explaining why); *Villanueva-Sotelo*, 515 F.3d at 1242 (D.C. Circuit acknowledging "that the Fourth Circuit reached the opposite conclusion in [*Montejo*]" and that "the Eleventh Circuit, along with several district courts, has adopted this interpretation," but concluding that "[w]e respectfully disagree with *Montejo*" and explaining why); *Hurtado*, 508 F.3d at 609 (finding support in the Fourth Circuit's resolution of the question). Moreover, two of the decisions have generated dissents, further airing the arguments in favor of the conflicting readings of the statutes. *See Miranda-Lopez*, 2008 WL 2762392, at *7-*10 (Bybee, J., dissenting); *Villanueva-Sotelo*, 515 F.3d at 1250-61 (Henderson, J., dissenting).

Moreover, no purpose would be served by further percolation. By and large, the decisions have addressed the same set of arguments regarding the text, purposes and legislative history of the Act, as well as the meaning of this Court's decisions in cases like *Liparota*. Given the thoroughness of the opinions already issued, it is unlikely that future decisions in other circuits will shed significant light on the debate.

In addition, as Judge Lynch observed, the question is recurring and important:

> A large number of cases are involved. The range of underlying felonies that can trigger this offense is broad. To give but a few examples of the scope of the issue, this offense can be charged when an unlawful means of identification is used in the course of Social Security fraud, 18 U.S.C. § 1028A(c)(11), passport fraud, *id.* § 1028A(c)(7), theft of public property, *id.* § 1028A(c)(1), fraud in the acquisition of a firearm, *id.* § 1028A(c)(3) , citizenship fraud, *id.* § 1028A(c)(2), and other crimes.

Godin, 2008 WL 2780646, at *10 (Lynch, C.J., concurring). In 2005, an FBI official testified before Congress that the Bureau had over 1600 open investigations into identity theft and expected the number of grow.[6] Thus, it is perhaps unsurprising

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[6] *See Securing Electronic Personal Data: Striking a Balance Between Privacy and Commercial and Governmental Use, Before the Subcomm. on Corrections and Rehabilitation of the S. Comm on the Judiciary*, 109th Cong. (2005) (Statement of Chris Swecker, Assistant Director, Criminal Investigative Division,

that six circuits have addressed the meaning of Section 1028A(a)(1)'s mens rea requirement in the past two years alone.

Finally, the present division of authority is unfair and untenable. Individuals committing precisely the same acts are subject to significantly different sentences depending on accidents of geography. The disparity is exacerbated by the fact that Congress took pains to ensure that defendants subject to Section 1028A(a)(1) would serve the entirety of the two-year additional sentence on top of the sentence received for their predicate offense. *See* 18 U.S.C. § 1028A(b) (requiring sentence be served consecutively to any other sentence and prohibiting courts from placing defendants convicted under this provision on probation). If the Government's construction of the statute is wrong, defendants in three circuits are serving sentences substantially harsher than Congress intended. On the other hand, if the Government's view is correct, Congress's intent to harshly punish aggravated identity theft often will be thwarted, including in the Ninth Circuit, the most populous circuit in the country.

3. This case presents an ideal vehicle for resolving the circuit conflict. The statutory question was the principal basis for dispute in the district court and the sole question presented on appeal. Pet. App. 3a. Moreover, the question is dispositive of petitioner's conviction. Petitioner does not dispute that his conviction was lawful unless the Government

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Federal Bureau of Investigation), *available at* http://judiciary.senate.gov/testimony.cfm?id=1437&wit_id=4162.

was required to prove that he knew that the Social Security or Permanent Resident registration number he used belonged to another actual person. At the same time, the Government acknowledged on appeal that petitioner "testified that he purchased the means of identification in Chicago and did not know that they were issued to real people." U.S. CA Br. 6. And the Government did not claim to have presented any evidence to contradict that testimony at trial.

II. A Defendant Does Not Knowingly Commit Aggravated Identity Theft Unless He Knows That The Means Of Identification He Is Using Belongs To Another Person.

Certiorari is also warranted because the decision below is wrong, conflicting with both the best reading of Section 1028A(a)(1) and the rule of lenity.

1. The text of Section 1028A(a)(1) is ambiguous as to the scope of its knowledge requirement. The word "knowingly" could apply to one or more of four aspects of the offense, as the provision applies to anyone who "knowingly [1] transfers, posseses, or uses, [2] without lawful authority, [3] a means of identification [4] of another person." 28 U.S.C. § 1028A(a)(1).

It is at least grammatically possible that the provision requires only that the defendant knew that his actions constituted "transferring, possessing, or using" something, and that Congress did not care whether the defendant knew that the thing was a means of identification, or that he lacked lawful authority for his action, or that the identification belonged to someone else. But this Court's

precedents demonstrate that this is surely not the only, or even the most plausible, reading.

Confronted with a similarly constructed provision in *Liparota v. United States*, 471 U.S. 419 (1985), this Court recognized the inherent textual ambiguity in such formulations. There, the Court construed a statute criminally punishing anyone who "knowingly uses, transfers, acquires, alters, or possesses [food stamps] in any manner not authorized by" law. *Id.* at 420 n.1 (quoting 7 U.S.C. § 2024(b)(1) (1982)). The Government argued that the prosecution was required to prove only that the defendant knowingly "use[d], transfer[ed], acquire[d], alter[ed], or possesse[d]" the food stamps in a manner that – known to the defendant or not – happened to violate federal law. *Id.* at 423. The defendant argued that the knowledge requirement extended through the entire clause, requiring the Government to show that he also knew that the manner in which he using the food stamps was not authorized by law. *Id.* Importantly for the present discussion, the Court found the language of the statute – which took the same form as Section 1028A(a)(1), using "knowingly" before a series of verbs followed by a direct object and a further limiting phrase – to be grammatically ambiguous:

> Although Congress certainly intended by use of the word "knowingly" to require *some* mental state with respect to *some* element of the crime defined in § 2024(b)(1), the interpretations proffered by both parties accord with congressional intent to this extent. Beyond this, the words themselves

> provide little guidance. Either interpretation would accord with ordinary usage.

471 U.S. at 424 (emphasis in original). The Court then noted that one "treatise has aptly summed up the ambiguity in an analogous situation:"

> Still further difficulty arises from the ambiguity which frequently exists concerning what the words or phrases in question modify. What, for instance, does "knowingly" modify in a sentence from a "blue sky" law criminal statute punishing one who 'knowingly sells a security without a permit' from the securities commissioner? To be guilty must the seller of a security without a permit know only that what he is doing constitutes a sale, or must he also know that the thing he sells is a security, or must he also know that he has no permit to sell the security he sells? As a matter of grammar the statute is ambiguous; it is not at all clear how far down the sentence the word "knowingly" is intended to travel – whether it modifies "sells," or "sells a security," or "sells a security without a permit."

Id. at 424 n.7 (quoting W. LaFave & A. Scott, *Criminal Law* § 27 (1972)).

The Fourth, Eighth, and Eleventh Circuits nonetheless have insisted that the text of Section 1028A(a)(1) is unambiguous, but their reasons are unpersuasive. These courts have asserted that because "knowingly" is an adverb, and located proximate to the words "transfers, possesses, or uses," it must be understood to apply only to those verbs. *See Mendoza-Gonzalez*, 520 F.3d at 915;

Hurtado, 508 F.3d at 309; *Montejo*, 442 F.3d at 215. But this Court recognized in *Liparota* that this is not true. 471 U.S. at 424 (noting of similarly constructed provision, "the words themselves provide little guidance" as to the reach of the knowingness requirement).[7] As the First Circuit rightly observed, "[c]ases holding that 'knowingly' extends to words and phrases other than verbs are legion." *Godin*, 2008 WL 2780646, at * 4 (collecting cases). To take but one example, no one could reasonably think that the federal statute criminalizing "knowingly . . . possess[ing] with intent to manufacture, distribute, or dispense, a controlled substance," 21 U.S.C. § 841(a)(1), would apply to a delivery truck driver who knew he was transporting for distribution *some* kind of substance, but did not know that the sealed packaged in his vehicle contained cocaine. Yet that would be the consequence of a rule applying the

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[7] The Fourth, Eighth, and Eleventh Circuits insist that *Liparota* is inapposite because its construction of the knowledge requirement in 7 U.S.C. § 2024(b)(1) was intended to avoid criminalizing innocent conduct. *Mendoza-Gonzalez*, 520 F.3d at 917; *Hurtado*, 508 F.3d at 609; *Montejo*, 442 F.3d at 213. That description of the basis of the Court's decisions is incorrect; the Court made clear that the concern about innocent conduct was simply one of several factors, including the rule of lenity, supporting its holding. *Liparota*, 471 U.S. at 426-27. But more importantly for present purposes, it was only because the Court found the text of the statute ambiguous that it was required to turn to other considerations like lenity and avoiding the criminalization of seemingly innocent conduct. *Id.* at 424. That textual conclusion was driven by the Court's recognition of the inherent ambiguity of the formulation used in the statute before it – a formulation repeated in Section 1028A(a)(1) – rather than by any policy concern. *Id.* at 424-25, 430.

adverb "knowingly" only to the verbs in Section 841(a)(1).

Equally absurd results would follow from applying the knowledge requirement of Section 1028A(a)(1) only to the provision's verbs. Take, for example, a person who knowingly transfers an envelope from one person to another, having been told, and in fact reasonably believing, that it contains a birthday card when it really contains a stolen Social Security card. *See United States v. Godin*, 476 F. Supp. 2d 1, 2 (D. Me. 2007). If the knowledge requirement in Section 1028A(a)(1) extends only to the provision's verbs, criminal liability would attach. But not even the Government believes that this is a sensible reading of the statute. In the D.C. Circuit the Government acknowledged that "the mens rea requirement must extend at least to the direct object's principal modifier, 'of identification.'" *Villanueva-Sotelo*, 515 F.3d at 1238.

Having made that reasonable concession, it is difficult to see how the Government can maintain that, as a linguistic matter, the knowledge requirement can only be read to extend to "means of identification" but not to the qualifying phrase "of another person." That is, once the word "knowingly" is "emancipated from merely modifying the verbs," then "as a matter of grammar it is difficult to conclude that the word 'knowingly' modifies one of the elements in [the subsection,] but not the other." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77-78 (1994). At the very least, the reach of the knowledge requirement is textually ambiguous.

The circuits accepting the Government's construction have also noted that Congress could

have written the provision to unambiguously extend the knowledge requirement to the "of another person element." *See, e.g.*, *Mendoza-Gonzalez*, 520 F.3d at 915; *Hurtado*, 508 F.3d at 609. Congress could, for example, have applied the provisions to one who "*knowingly* transfers, posses, or uses, what he *knows* to be a means of identification belong to another *known* person, *knowing* that he lacked lawful authority to do so." But that kind of repetition is awkward and inconsistent with common usage, as would be a provision making abundantly clear that the knowledge requirement applies only to the verbs (*e.g.*, "knowingly transfers, posses, or uses something which, whether known to him or not, is a means of identification of another person used without lawful authority"). In the end, the construction Congress did use is consistent with common usage, but inherently ambiguous.

2. This Court must resolve the statutory ambiguity in favor of lenity unless "resort to 'the language and structure, legislative history, and motivating policies' of the statute" removes all "reasonable doubt . . . about [the] statute's intended scope." *Moskal v. United States*, 498 U.S. 103, 108 (1990); *see, e.g.*, *Liparota*, 471 U.S. at 427. In this case, those considerations support the interpretation lenity would otherwise require.

a. *Legal Backdrop.* Section 1028A(a)(1) must be read in light of a legal tradition that ordinarily imputes the mens rea requirement of a statute to each of its elements, unless there is some good reason to do otherwise. *See Model Penal Code* § 2.02(4) (1985) ("When the law defining an offense prescribes the kind of culpability that is sufficient for the

commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears."); *X-Citement Video, Inc.*, 513 U.S. at 70 (reading criminal statute in light of "our cases interpreting criminal statutes to include *broadly applicable* scienter requirements") (emphasis added). To be sure, that presumption can be overcome, but as discussed next, nothing in the structure, history, or purposes of the statute points strongly in favor of an unusual reading here.

b. *Structure.* The subsection immediately following Section 1028A(a)(1) provides:

> (2) Terrorism offense.--Whoever, during and in relation to any felony violation enumerated in section 2332b(g)(5)(B), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person *or a false identification document* shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 5 years.

18 U.S.C. § 1028A(a)(2) (emphasis added).

Two aspects of this provision render the Government's construction of Section 1028A(a)(1) untenable.

First, the italicized language makes clear that in the case of terrorism offenses, it is enough that the defendant knew that his identification document was false, regardless of whether or not he knew that the identification belonged to another person. Congress thus knew how to make irrelevant the defendant's

knowledge of whether the identification he used belonged to another, and did so in an immediately adjoining subsection of the statute.

Second, in the D.C. Circuit, the Government conceded that the knowledge requirement in the terrorism offense provision extended to the phrase "false identification document," such that the defendant would have to know that the document was false in order to commit the offense under that prong of the provision. *Villanueva-Sotelo*, 515 F.3d at 129. But that concession requires the Court to believe one of two implausible propositions: (a) that the knowledge requirement in Section 1028A(a)(2) hopscotches among the provision's various elements, landing on the verbs and the words "means of identification" before leaping over "of another person" to alight on "false identification document"; or (b) that the knowledge requirement applies to the "of another person" element in the terrorism offense provision but not in its immediate predecessor provision, Section 1028A(a)(1). Because identical neighboring clauses in a statute should be read in a consistent manner, neither view is plausible.

c. *Purposes and Legislative History.* The purposes and legislative history of the provision further support petitioner's reading. The title of the provision is "Aggravated identity theft," 18 U.S.C. § 1028A. The word "theft" implies the knowing acquisition of the property of another.[8] Thus, for

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[8] *Black's Law Dictionary* defines "theft" as the "felonious taking and removing of another's personal property with the intent of depriving the true owner of it." *Black's Law Dictionary* 1516 (8th ed. 2004).

example, one who takes in a cat, believing that it is a stray, does not commit "theft" as commonly understood simply because it turns out that the cat in fact belongs to someone else. It is the thief's knowledge that the taken property belongs to another that distinguishes misappropriation from thievery. *See, e.g.*, *United States v. Hurt*, 527 F.3d 1347, 1350 (D.C. Cir. 2008) (theft requires specific intent to take possession of the property of another); W. LaFave, *Substantive Criminal Law* § 19.5(a) (2d ed. 2003) (same). Likewise, when a person makes up a Social Security number, having no idea whether it belongs to someone else, it is hard to see how that conduct qualifies as "theft" – much less "aggravated theft" – within the ordinary meaning of those terms.

The legislative history likewise demonstrates that Congress was focused on the problem of intentional identity theft, not unintentional misappropriation. Pursuant to the Identity Theft Penalty Enhancement Act, H.R. 1731, 108th Cong. (2004), in 2004 Congress modified § 1028A to "address[] the growing problem of identity *theft*. . . [including that] many identity *thieves* receive short terms of imprisonment or probation." H.R. Rep. No. 108-528, at 3 (2004), *as reprinted in* 2004 U.S.C.C.A.N. 779, 780 (emphasis added). The practices Congress focused on all involved the intentional theft of the identification of known individuals. Thus, the House Report emphasized that because of the large number of complaints to the Federal Trade Commission from victims whose information was pilfered, "we must try to find new ways to combat" not only such unsophisticated practices as "dumpster diving," but also theft of "information that was originally collected for an

authorized purpose," including database hacking and illicit employee access to confidential information. *Id.* at 4-5. Indeed, all of the specific examples cited in the House Report "involved defendants who . . . knew the identification they used belonged to another." *Villanueva-Sotelo*, 515 F.3d at 1244 (describing that all of the specific examples cited in the House Report "involved defendants who . . . knew the identification they used belonged to another"). And although some examples may be clearer than others, *see Godin*, 2008 WL 2780646, at *7, at the very least none plainly encompasses a case in which a defendant simply used an identification number that, unbeknownst to him, turned out to have been assigned to another person. *See Villanueva-Sotelo*, 515 F.3d at 1245.

The distinction between theft and unknowing misappropriation is not a technicality, but instead goes to the core of what Congress found to be so especially culpable as to warrant additional, and quite severe, punishment as "aggravated identity theft." The focus on intentional theft illustrates that Congress was principally concerned in this provision not with addressing *fraud*, which is punished severely elsewhere,[9] but rather with recognizing the additional level of culpability that arises when a defendant knowingly seeks to use a means of identification that belongs to another person and, therefore, intentionally risks inflicting special harms on the person whose identity the defendant steals.

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[9] For example, violations of 18 U.S.C. § 1546, punishing "Fraud and misuse of visas, permits, and other documents," are punishable by up to a ten years' imprisonment for a first offense. *Id.* § 1546(a).

Indeed, the legislative history focuses extensively on that potential harm. *See Villanueva-Sotelo*, 515 F.3d at 1243-44 (collecting examples).

Of course, an individual sometimes can be harmed by accidental misappropriation of his means of identification as well. But that does not change the fact that the degree of a defendant's culpability turns most critically on the state of his intentions.[10] Put simply, someone who intends to steal another's identity is worthy of greater punishment than one who unintentionally picks an identification number out of thin air that happens to match one already issued to someone else. To be sure, both defendants have engaged in culpable conduct in using a false identification. But the purpose of the sentencing enhancement in Section 1028A(a)(1) is to provide additional punishment when that *fraud* also amounts to identity *theft*, a concept commonly understood to encompass the intentional taking of property known to belong to another.

Applying the knowledge requirement to the "of another person" element thus tracks the distinction most relevant to culpability. The Government, on the other hand, would mete out extraordinary punishment not on the basis of anything the

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[10] Moreover, the risk of harm to the victim is more significant when the misappropriation is intentional – a defendant like petitioner, who uses false identification to secure employment with no intention of stealing anyone's identity, surely is less dangerous than is a defendant who seeks out Social Security numbers and other identification belonging to real people, often in order to facilitate absconding with their money or misusing their credit.

defendant intended, but rather based on the random happenstance that some defendants acquire Social Security numbers that happen not to have been assigned yet, while others are not so lucky.

3. Even if it is possible to hypothesize a Congress that would have intended such a result, such speculation is an insufficient basis for resolving a textual ambiguity in a criminal statute against the defendant. "When interpreting a criminal statute," this Court does not "play the part of a mind reader." *United States v. Santos*, 128 S. Ct. 2020, 2026 (2008) (plurality opinion). Instead, in choosing between plausible constructions of a criminal statute, "it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347 (1971) (internal quotation marks omitted). Accordingly, when "Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Bell v. United States*, 349 U.S. 81, 83 (1955).

In this case, at the very least, consideration of the structure, history and purposes of Section 1028A(a)(1) does not decisively resolve the textual ambiguity in favor of the Government.[11] The rule of lenity therefore requires rejection of the

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[11] Indeed, none of the circuits accepting the Government's view have done so on the strength of the legislative history, strcture, or purposes of the statute. Instead, all have found – incorrectly – that the statutory language was unambiguous. *See Mendoza-Gonzalez*, 520 F.3d at 915; *Hurtado*, 508 F.3d at 608; *Montejo*, 442 F.3d at 217.

Government's interpretation and reversal of petitioner's conviction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 22, 2008

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

United States of America,

Appellee,

v.

Ignacio Carlos Flores-Figueroa,

Appellant.

No. 07-2871

Appeal from the United States District Court
for the Southern District of Iowa.
[UNPUBLISHED]

Submitted: April 15, 2003
Filed: April 23, 2008

Before GRUENDER, BALDOCK[1] and BENTON,
Circuit Judges

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[1] The Honorable Bobby R. Baldock, United States Circuit Judge for the Tenth Circuit, sitting by designation.

PER CURIAM

Ignacio Flores-Figueroa appeals his conviction for aggravated identity theft in violation of 18 U.S.C. § 1028A(a)(1), arguing that the Government must prove that he knew that the means of identification he possessed belonged to another person. Based on our precedent, we reject his argument and affirm his conviction.

In connection with his employment at L & M Steel Services, Inc., Flores, an illegal alien, used a fraudulent alien registration number and a fraudulent Social Security number. Both numbers belonged to other individuals. Flores pled guilty to two counts of misuse of immigration documents in violation of 18 U.S.C. § 1546(a), and one count of entry without inspection under 8 U.S.C. § 1325(a). He pled not guilty to two counts of aggravated identity theft. At his bench trial, Flores argued that he could not be convicted because the Government did not prove that he knew that the identification he possessed belonged to other people, which he claims is required to convict him under 18 U.S.C. § 1028A(a)(1). After rejecting this argument and finding him guilty of two counts of aggravated identity theft, the district court[2] sentenced Flores to 51 months' imprisonment for the misuse of immigration documents and entry without inspection offenses and a consecutive 24 months' imprisonment

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[2] The Honorable John A. Jarvey, United States District Judge for the Southern District of Iowa.

for the aggravated identity theft offenses, resulting in a total sentence of 75 months' imprisonment.

On appeal, Flores renews his argument that 18 U.S.C. § 1028A(a)(1) requires the Government to prove that a defendant knew that the means of identification belonged to another person. Section 1028A(a)(1) states that "[w]hoever, during and in relation to any felony violation enumerated in [§ 1028A(c)] knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years." The Government argues that "knowingly" modifies only "transfers, possesses, or uses," whereas Flores argues that "knowingly" modifies not only "transfers, possesses, or uses," but also the phrase "of another person," which would require the Government to prove that a defendant knew the means of identification belonged to another person.

In *United States v. Mendoza-Gonzalez*, --- F.3d ---, 2008 WL 819161, at *2-3 (8th Cir. Mar.28, 2008), we resolved this issue and determined that under the plain language of the statute, "knowingly" modified only the verbs "transfers, possesses, or uses," and not the phrase "of another person." Therefore, the Government need not prove that Flores knew that the means of identification belonged to another person. Flores does not challenge the sufficiency of the Government's evidence that the means identification he possessed belonged to another person. Accordingly, we affirm Flores's conviction.

APPENDIX B

United States District Court
SOUTHERN District of IOWA

UNITED STATES OF AMERICA

v.

Ignacio Carlos Flores-Figueroa

Case Number: 3:07-cr-00515

USM Number:

Gary Koos

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) One, Two, and Five

☐ pleaded nolo contendere to count(s) which was accepted by the court.

X was found guilty on count(s) Three and Four after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
T.18:1546(a)	Misuse of	1-22-07	One &
T.18:1028A(a)(1)	Immigration	1-22-07	Two

T.8:1325(a)	Documents Aggravated Identity Theft Entry Without Inspection	1-22-07	Three & Four Five

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

August 13, 2007
Date of Imposition of Judgment

Signature of Judge
John A. Jarvey, U.S. District Court Judge
Name and Title of Judge

August 13, 2007
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 75 months. This term shall consist of 51 months, as to Counts One and Two, and 6 months, as to Count Five, which shall run concurrently with each other. As to Counts Three and Four, 24 months imprisonment, which shall run concurrent to each other and consecutive to Counts One, Two and Five.

☐ The court makes the following recommendations to the Bureau of Prisons:

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on

_____ to

_____ a

_____, with a

certified copy of this judgment.

_____
UNITED STATES MARSHAL

By_____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

Three years on counts one and two, and one year on counts three, four, and five, to be served concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

The defendant shall not return to the United States after deportation.

The defendant shall not use alcohol or other intoxicants.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on

	Assessment	Fine	Restitution
TOTALS	$ 450.00	None	None

☐ The determination of restitution is deferred _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentages payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea

_____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for

☐ fine ☐ restitution.

☐ the interest requirement for
☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties

A ☒ Lump sum payment of $ $450.00 due immediately, balance due

☐ not later than _____, or

☒ in accordance ☐ C, ☐ D, ☐ E, or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

All criminal monetary penalty payments are to be made to the Clerk's Office, U.S. District Court, P.O. Box 9344, Des Moines, IA 50306-9344.

While on supervised release, you shall cooperate with the Probation Officer in developing a monthly payment plan consistent with a schedule of allowable expenses provided by the Probation Office.

Nothing in this judgment shall be construed as a limitation on the authority of the United States to apply to the Court for a writ of garnishment subject to the approval of the Court in accordance with the Federal Debt Collection Procedure Act, 28 U.S.C. §§3301, et seq., or applicable State law, during the time period that the defendant is incarcerated or under supervision pursuant to this judgment. (See 18 U.S.C. §3664(m)).

Nothing in this judgment shall be construed as a limitation or restriction on the authority of the Bureau of Prisons to require additional payments as a condition for an assignment or for participation in any program.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ **Joint and Several**

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ **The defendant shall pay the cost of prosecution.**

☐ **The defendant shall pay the following court cost(s):**

☐ **The defendant shall forfeit the defendant's interest in the following property to the United States:**

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

REPLY BRIEF

107

No. 08-108

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

IGNACIO FLORES-FIGUEROA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
REPLY BRIEF FOR THE PETITIONER 1
CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Liparota v. United States, 471 U.S. 419 (1985) 2, 4, 10

United States v. Godin, 534 F.3d 51 (1st Cir. 2008) 2, 3

United States v. Miranda-Lopez, 532 F.3d 1034 (9th Cir. 2008) 2, 3

United States v. Santos, 128 S. Ct. 2020 (2008) 9, 10

United States v. Villanueva-Sotelo, 515 F.3d 1234 (D.C. Cir. 2008) ..... passim

United States v. Williams, 128 S. Ct. 1830 (2008) 5, 6

United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) 3, 4

Statutes

7 U.S.C. § 2024(b)(1) 4

18 U.S.C. § 1028A(a)(1) ..... passim

18 U.S.C. § 1028A(a)(2) 2, 7

18 U.S.C. § 2252(a) 4

18 U.S.C. § 2252A(a)(3) 6

18 U.S.C. § 2252A(a)(3)(B) 5

Other Authorities

H.R. REP. NO. 108-528 (2004), *as reprinted in* 2004 U.S.C.C.A.N. 779 8

REPLY BRIEF FOR THE PETITIONER

The Government acknowledges that the petition for certiorari in this case, along with the pending petition in *Mendoza-Gonzalez v. United States*, No. 08-5316, "presents an important and recurring issue that warrants this Court's review" in light of the "clear and entrenched conflict among the courts of appeals" over the mens rea requirement of 18 U.S.C. § 1028A(a)(1). BIO 4. Accordingly, the Government agrees that the Court should grant certiorari in a pending case to restore uniformity to this area of the law. *See id.*

The question, then, is which case, or cases, the Court should use to resolve that untenable conflict. The Solicitor General does not suggest any jurisprudential or discretionary reason for preferring plenary review in one case rather than the other. He does not dispute, for example, petitioner's showing, *see* Pet. 15-16, that this case presents an ideal vehicle for resolving the question presented. The Government nonetheless recommends that the Court grant the petition in *Mendoza-Gonzalez* and hold the petition in this case, apparently on the ground that the *Mendoza-Gonzalez* petition is the "earlier-filed" of the two petitions (by a week). BIO 4. But there surely are more important considerations, including this Court's interest in a ensuring the best and most comprehensive presentation of the legal arguments that will inform its decision.

And that consideration, petitioner respectfully suggests, militates strongly in favor of plenary review in this case, either in addition to, or instead of, *Mendoza-Gonzalez*. In particular, the petition in this

case raises a number of significant arguments that the petitioner in *Mendoza-Gonzalez* has not made and to which the Government has, as a result, provided no response. Those omissions are consequential, for once the omitted arguments are considered, the Government's attempt to defend the Eighth Circuit's construction of Section 1028A(a)(1) becomes entirely unconvincing.

1. The petition in this case sets out a number of arguments not made in *Mendoza-Gonzalez* but relied upon by the courts of appeals that have rejected the Government's construction of Section 1028A(a)(1). These include, among others, the arguments that:

- This Court's decision in *Liparota v. United States*, 471 U.S. 419 (1985), compels the conclusion that the language in Section 1028A(a)(1) is ambiguous as to the reach of the statute's knowledge requirement. *See* Pet. 17-18; *United States v. Godin*, 534 F.3d 51, 58 (1st Cir. 2008) (relying on argument in rejecting Government's reading of the statute); *United States v. Miranda-Lopez*, 532 F.3d 1034, 1038 (9th Cir. 2008) (same); *United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1241 (D.C. Cir. 2008) (same).
- The Government's view is incompatible with the structure of Section 1028A(a)(1)'s immediate neighbor, Section 1028A(a)(2). *See* Pet. 22-23; *Villanueva-Sotelo*, 515 F.3d at 1239-40; *cf. Godin*, 534 F.3d at 58-59 (comparison does not support the Government's view).

- Rather than limiting mens rea requirements narrowly to refer solely to the elements that immediate follow, as the Government contends, this Court has recognized a legal tradition of applying mens rea requirements broadly to each element of an offense, absent good reason to believe Congress intended a contrary result. *See* Pet. 21-22; *Villanueva-Sotelo*, 515 F.3d at 1239; *cf. Miranda-Lopez*, 532 F.3d at 1038 (noting Justice Stevens' recognition of the principle in his concurrence to *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 79 (1994) (Stevens, J., concurring)).
- At the very least, the statute is ambiguous and must, therefore, be construed in favor of a broader mens rea requirement in accordance with the rule of lenity. *See* Pet. 27-28; *Godin*, 534 F.3d at 60-61; *Miranda-Lopez*, 532 F.3d at 1040; *see also Villanueva-Sotelo*, 515 F.3d at 1246.

Not only did Mendoza-Gonzalez fail to raise these important arguments in his petition for certiorari, but the Government has also declined to respond to any of them in its briefing in that case. Thus, for example, even though the First and Ninth Circuits based their decisions on the rule of lenity, the Government makes no mention of that venerable doctrine in its brief in *Mendoza-Gonzalez*. *Compare Godin*, 534 F.3d at 60-61, *and Miranda-Lopez*, 532 F.3d at 1040, *with Mendoza-Gonzalez* BIO 8-11.

Perhaps the Government may be excused for limiting its brief in *Mendoza-Gonzalez* to the

arguments raised by the petitioner in that case. More difficult to understand, however, is its recommendation that in choosing between two cases presenting the same certworthy question, this Court should grant plenary review in the case that presents the less comprehensive challenge to the Government's view of the statute.

2. The Government's incomplete engagement with the arguments undermining its interpretation of Section 1028A(a)(1) also renders its defense of the Eighth Circuit's construction of the statute unpersuasive.

a. *Text.* In its brief in *Mendoza-Gonzalez*, the Government argues that as "'a matter of common usage,' the adverb 'knowingly' is not sensibly read as 'modify[ing] the entire lengthy predicate that follows it.'" *Mendoza-Gonzalez* BIO 8 (citation omitted). But the Government ignores that this Court has held quite to the contrary, recognizing that as a matter of "ordinary usage," the formulation used in provisions like Section 1028A(a)(1) *can* sensibly be read to apply the statute's mens rea requirement to the entire predicate that follows. *Liparota v. United States*, 471 U.S. 419, 424 (1985) (construing 7 U.S.C. § 2024(b)(1)); *see also X-Citement Video, Inc.*, 513 U.S. at 68-79 (construing 18 U.S.C. § 2252(a)); Pet. 17-20.

The Government insists, however, that the "'last antecedent rule holds that qualifying words and phrases usually apply only to the words or phrases immediately preceding or following them, not to others that are more remote.'" *Mendoza-Gonzalez* BIO 8 (quoting *Mendoza-Gonzalez* Pet. App. 4a-5a). But as noted in the petition in this case, even the

Government apparently does not believe that the last antecedent rule results in a sensible construction of this statute, for it has conceded elsewhere that the knowledge requirement of Section 1028A(a)(1) must extend beyond the words that immediately follow it to encompass at least the phrase "means of identification." *See* Pet. 9 (citing *Villanueva-Sotelo*, 515 F.3d at 1238).

In truth, whatever its value in other contexts, the last antecedent rule has little bearing on the question of the scope of the mens rea requirement of a criminal statute. *See* Pet. 18-20. (In fact, the Government does not cite any case from this Court in which the principle has been applied in that context, and petitioner is aware of none). Instead, as petitioner has shown, this Court has applied a general presumption that a mens rea requirement ordinarily extends to all of the elements of the offense. Pet. 21-22.

This Court recently applied that presumption in *United States v. Williams*, 128 S. Ct. 1830, 1839 (2008). There, the Court construed a provision that criminally punished anyone who "knowingly . . . advertises, promotes, presents, distributes, or solicits . . . any material or purported material in a manner that reflects a belief, or that is intended to cause another to believe, that the material or purported material is, or contains" child pornography. 18 U.S.C. § 2252A(a)(3)(B). This Court did not apply the last antecedent rule to hold that the knowledge requirement was limited to the verbs that immediately followed (in fact, the Court did not even mention the rule). Instead, the Court proceeded from the assumption that the mens rea requirement

"applies to every element of" the offense. 128 S. Ct. at 1839. The Court then acknowledged that the presumption could be overcome by other grammatical or structural cues, but found that this was "not a case where grammar or structure enables the challenged provision or some of its parts to be read apart from the 'knowingly' requirement." *Id.*

The Government argues that the result in *Williams* was driven by the fact that the word "'knowingly' was set off from and 'introduce[d]' two distinct statutory subsections." *Mendoza-Gonzalez* BIO 11 n.3 (quoting *Williams*, 128 S.Ct. at 1839). That feature of the statute explains why the Court concluded that the knowledge requirement applied to both of the separately codified subsections of Section 2252A(a)(3). *See* 128 S. Ct. at 1839. But it does not explain why the Court concluded that the mens rea requirement applied to each of the elements *within* each of the subsections as well. *See* 128 S. Ct. at 1839 ("We think that the best reading of the term in context is that it applies to every element of the two provisions."). The Court reached *that* conclusion not because the word "knowingly" was set apart from the subsections but rather because the word preceded the other elements of the offense and there was no grammatical or structural indication that Congress intended its reach to apply to less than the full scope of the provision. *Id.* The same is true here: the word "knowingly" precedes and introduces the rest of the elements of the Section 1028A(a)(1) offense and "there is no grammatical barrier" to reading it as applying to all of the elements that follow. *Id.*

b. *Structure*. The Government's interpretation of Section 1028A(a)(1) also cannot be squared with Congress's construction of that provision's immediate neighbor, Section 1028A(a)(2). *See* Pet. 22-23; *see also Villanueva-Sotelo*, 515 F.3d at 1239-40. The latter provision creates a sentencing enhancement for a person who, "during and in relation to" certain terrorism-related offenses, "knowingly transfers, possesses, or uses, without lawful authority, a means of identification *of another person* or a *false* identification document." 18 U.S.C. § 1028A(a)(2) (emphasis added). Consistency seemingly would require the Government to argue that the knowledge requirement of this provision applies to neither of the italicized phrases, as neither directly follows the qualifying adverb and both modify the direct object of the provision's verbs. Yet the Government conceded in the D.C. Circuit that the provision must at least require proof that the defendant knew that the identification document he possessed was false. *Villanueva-Sotelo*, 515 F.3d at 1239-40. And it has provided no explanation here as to why the same should not also be true when the defendant is charged with using a means of identification of another person. (Indeed, the Government has provided no response to this argument at all, either in response to the petition in *Mendoza-Gonzalez* – which does not raise this argument – or in its response to the petition in this case.)

c. *Purposes and Legislative History*. The Government does not seriously dispute that the legislative history reveals a congressional purpose to target acts of intentional identity theft in which the defendant acquires a means of identification he or

she knows belongs to another person. *See Mendoza-Gonzalez* BIO 10.[1] The Solicitor General nonetheless insists that Congress intended to enact a broader statute because "the harm experienced by the victim whose identity has been misappropriated does not vary depending on the defendant's knowledge of his existence," and because requiring the Government to prove intentional theft (as opposed to accidental misappropriation) would impose an undue burden on the prosecution. *Mendoza-Gonzalez* BIO 9. Neither argument is persuasive.

First, as noted in the petition, Pet. 26 n.10, the premise of the Government's first argument is

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[1] The Government quotes part of a sentence in the House Report, which it says "states that the crime of identity theft encompasses '*all* types of crimes in which someone wrongfully obtains and uses another person's personal data in some way that involves fraud or deception.'" *Mendoza-Gonzalez* BIO 11 (quoting H.R. REP. NO. 108-528, at 4 (2004), *as reprinted in* 2004 U.S.C.C.A.N. 779, 780) (emphasis added by BIO). But the Government's quotation is incomplete and its characterization of the passage mistaken. The language the Government quotes does not define "the crime of identity theft" standing alone, *Mendoza-Gonzalez* BIO 11, but rather the collective scope of *both* "'identity theft' *and* 'identity fraud,'" H.R. REP. NO. 108-528, at 4 (2004), *as reprinted in* 2004 U.S.C.C.A.N. 779, 780 (emphasis added), which *together* cover the gamut of cases involving both the intentional theft of another known person's identification and the fraudulent use of false identification documents without any knowledge of whether the identification numbers belong to someone else. Consistent with this distinction, the statute then imposes a two-year enhancement for identity *theft*, Section 1028A(a)(1), and a separate enhancement for identity *fraud* when the fraud is in relation to a terrorism offense, Section 1028A(a)(2).

doubtful. Congress could reasonably conclude that the risk of harm to victims is substantially greater when a defendant seeks out an identification number he knows belongs to another person, as is always the case in the instances of quintessential identity theft upon which Congress focused when enacting this provision. *See* Pet. 23-27. In any event, sentencing enhancements ordinarily are directed at providing additional punishment for especially culpable behavior. And that culpability turns most critically on the state of the defendant's intentions. Pet. 25-26. The Government does not, and cannot reasonably, contest that a defendant who seeks out an identification number that he knows belongs to another person is more culpable than a defendant who makes up a fake social security number without any belief that it has been assigned to another real person.

As to the Government's insistence that Congress would have intended a more prosecution-friendly interpretation, Congress routinely requires prosecutors to prove that a defendant was aware of the facts that make his actions criminal, even though the requirement makes convicting defendants more difficult. *See* Pet. 19-20. Moreover, the Government's argument "turns the rule of lenity upside-down." *United States v. Santos*, 128 S. Ct. 2020, 2028 (2008) (plurality). This Court "interpret[s] ambiguous criminal statutes in favor of defendants, not prosecutors." *Id.*

d. *Rule of Lenity*. Indeed, the entirety of Government's defense of the Eighth Circuit's interpretation of Section 1028A(a)(1) founders upon the long-established rule of lenity, which precludes a

court from resolving the ambiguity in a criminal statute by guessing at which reading would best serve a presumed congressional purpose or by relying on snippets of legislative history to find clarity missing from the provision's text. *See, e.g., id.* at 2025 & n.3.

In this case, the circuit conflict arises precisely because of the unavoidable uncertainty as to the statute's scope. The statutory text standing alone is inherently ambiguous. *See Liparota*, 471 U.S. at 424. The broader statutory context does not resolve the ambiguity in the Government's favor; to the contrary, if anything, it supports petitioner's view. *See Villanueva-Sotelo*, 515 F.3d at 1239-40. And at best, the Government can claim that the legislative history and general purposes of the statute do not point strongly in either direction on the question presented. In such circumstances, the rule of lenity "vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed." *Santos*, 128 S. Ct. at 2025 (plurality). At the same time, the rule "places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." *Id.*

Because Congress did not unambiguously extend Section 1028A(a)(1)'a sentencing enhancement for "identity theft" to accidental misappropriation of identification numbers, the Eighth Circuit erred in applying that provision to petitioner and his conviction accordingly should be reversed.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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PETITIONER'S BRIEF

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QUESTION PRESENTED

Whether, to prove aggravated identity theft under 18 U.S.C. § 1028A(a)(1), the Government must show that the defendant knew that the means of identification he used belonged to another person.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

BRIEF FOR THE PETITIONER 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT STATUTORY PROVISION 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 5

ARGUMENT 8

I. The "Aggravated Identity Theft" Statute Requires Proof That The Defendant Knew That The Means Of Identification He Used Belonged To Another Person. 8

A. The Text and Structure Indicate Congress's Intent To Extend The Provision's Knowledge Requirement To "Of Another Person." 8

B. The Natural Reading Of The Text Is Consistent With The Traditional Conception Of "Theft" And The Treatment Of Mens Rea Requirements In Criminal Statutes. 13

1. Traditional Understanding Of "Theft" .. 13

2. Presumption That Mens Rea Requirements Apply To All Facts That Make The Defendant's Conduct Unlawful 18

C. Petitioner's Reading Is Consistent With The Statute's Purposes 20

II. The Court Of Appeals' Reasons For Giving Section 1028A(a)(1) An Expansive Interpretation Lack Merit 23

A. The Text Does Not Unambiguously Limit "Knowingly" To The Provision's Verbs. 23

B. The Eighth Circuit's Misreading Of The Text Is Not Justified By Any Statutory Purpose. 30

1. Protecting Victims 30

2. Facilitating Prosecutions 32

III. The Court Of Appeals' Interpretation Is Inconsistent With The Rule Of Lenity. 34

CONCLUSION 39

APPENDIX 1a

TABLE OF AUTHORITIES

Cases

Barnhart v. Thomas,
540 U.S. 20 (2003) 25, 25, 26

Bryan v. United States,
524 U.S. 184 (1998) 18, 29

Caron v. United States,
524 U.S. 308 (1998) 35

Crandon v. United States,
494 U.S. 152 (1990) 35

Dixon v. United States,
548 U.S. 1 (2006) 18

Dowling v. United States,
473 U.S. 207 (1985) 8

Ex parte Bollman & Ex parte Swartwout,
8 U.S. (4 Cranch) 75 (1807) 26

Fed. Trade Comm'n v. Mandel Brothers, Inc.,
359 U.S. 385 (1959) 26

Gall v. United States,
128 S.Ct. 586 (2007) 37

Hughey v. United States,
495 U.S. 411 (1990) 37

Jama v. Immigration and Customs Enforcement,
543 U.S. 335 (2005) 26

Johnson v. Sayre,
158 U.S. 109 (1895) 26

Johnson v. State,
36 Tex. 375 (1871) 16

Koon v. United States,
518 U.S. 81 (1996) 37

Landgraf v. USI Film Prods.,
511 U.S. 244 (1994) 20

Liparota v. United States,
471 U.S. 419 (1985) ..... passim

Moskal v. United States,
498 U.S. 103 (1990) 35

Nobelman v. Am. Sav. Bank,
508 U.S. 324 (1993) 26

Regina v. Riley,
169 Eng. Rep. 674 (1853) 16

Regina v. Thurborn,
169 Eng. Rep. 293 (1848) 16

Rogers v. United States,
522 U.S. 252 (1998) 18

Scheidler v. Nat'l Org. for Women, Inc.,
537 U.S. 393 (2003) 19, 20

Scott v. Jones,
46 U.S. (5 How.) 343 (1847) 26

Staples v. United States,
511 U.S. 600 (1994) 8, 18

United States v. Bailey,
444 U.S. 394 (1980) 19, 20

United States v. Bass,
404 U.S. 336 (1971) 26, 34, 35, 37

United States v. Feola,
420 U.S. 671 (1975) 18

United States v. Godin,
534 F.3d 51 (1st Cir. 2008) 17, 24

United States v. Hurtado,
508 F.3d 603 (11th Cir. 2007) 36

United States v. Lanier,
520 U.S. 259 (1997) 35

United States v. Mendoza-Gonzalez,
520 F.3d 912 (8th Cir. 2008) ..... passim

United States v. Montejo,
442 F.3d 213 (4th Cir. 2006). 36

United States v. Morissette,
342 U.S. 246 (1952) ..... passim

United States v. R.L.C.,
503 U.S. 291 (1992) 36

United States v. Resendiz-Ponce,
549 U.S. 102 (2007) 19

United States v. Santos,
553 U.S. , 128 S. Ct. 2020 (2008) 34

United States v. U.S. Gypsum Co.,
438 U.S. 422 (1978) 19

United States v. Villanueva-Sotelo,
515 F.3d 1234 (D.C. Cir. 2008) ..... passim

United States v. Wiltberger,
18 U.S. 76 (1820) 9

United States v. X-Citement Video, Inc.,
513 U.S. 64 (1994) 10, 11, 18, 29

Statutes

Identity Theft Penalty Enhancement Act,
Pub. L. 108-275, 118 Stat. 831 (2004) 14

7 U.S.C. § 2024(b)(1) (1982) 27

8 U.S.C. § 1325 3

11 U.S.C. § 1322(c)(2) 26

18 U.S.C. § 641 13
18 U.S.C. § 1028A ..... passim
18 U.S.C. § 1028A(a)(1) ..... passim
18 U.S.C. § 1028A(a)(2) 12
18 U.S.C. § 1028A(b) 4, 21
18 U.S.C. § 1425 21
18 U.S.C. § 1546 3
18 U.S.C. § 1546(a) 21
18 U.S.C. § 1546(b) 21

Other Authorities

150 Cong. Rec. H4808, H4810 (2004) 17
AMERICAN BAR ASSOCIATION JUSTICE KENNEDY COMMISSION, RECOMMENDATIONS ON PUNISHMENT, INCARCERATION, AND SENTENCING (2004) 37, 38
BLACK'S LAW DICTIONARY (8th ed. 2004) 15
CHICAGO MANUAL OF STYLE (15th ed. 2003) 24
Hearing on H.R. 1731 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 108th Cong. (2004) 15, 20
O.W. HOLMES, JR., THE COMMON LAW (1881) 15
H.R. Rep. 108-528 (2004), *as reprinted in* 2004 U.S.C.C.A.N. 779 ..... 15, 16, 20
W. LAFAVE & A. SCOTT, CRIMINAL LAW (1972) 28
MODEL PENAL CODE (1985) 19, 20
Pres. Identity Theft Taskforce, COMBATING IDENTITY THEFT: VOLUME II (2007) 31

RUSSELL ON CRIMES (1828) 16

N. SINGER & J.D. SINGER, SUTHERLAND STATUTORY CONSTRUCTION (7th ed. 2007) 26

Synovate, Fed. Trade Comm'n, IDENTITY THEFT SURVEY REPORT (2003) 31

Barbara S. Vincent & Paul J. Hofer, FEDERAL JUDICIAL CENTER, THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS 21 (2004) 38

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993) 15

John Shepard Wiley, Jr., *Not Guilty By Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021 (1999) 19

BERNARD WILLIAMS, MORAL LUCK: PHILOSOPHICAL PAPERS (1981) 22

BRIEF FOR THE PETITIONER

Petitioner Ignacio Flores-Figueroa respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinions of the court of appeals, Pet. App. 1a-3a, and the district court, Pet. App. 4a-15a, are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 2008. Petitioner filed a timely petition for a writ of certiorari on July 22, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

18 U.S.C. § 1028A is reproduced in full in the statutory appendix to this brief. In most relevant part, it provides:

§ 1028A. Aggravated identity theft

(a) Offenses.—

(1) In general. Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

STATEMENT OF THE CASE

Section 1028A(a)(1) of Title 18 imposes a mandatory two-year sentence upon anyone who, during and in relation to certain predicate offenses, "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." Petitioner Flores-Figueroa used, without lawful authority, false social security and alien registration numbers in order to secure a job. Originally, petitioner used numbers that were simply fabricated and had never been assigned to an actual person. Subsequently, petitioner obtained a new set of identification numbers which, unbeknownst to him, had been assigned to real people. With respect to those false documents, the Government charged petitioner with "aggravated identity theft" under Section 1028A(a)(1). The question presented is whether a defendant "*knowingly* . . . uses, without lawful authority, a means of identification of another person," *id.* (emphasis added), within the meaning of that provision when he does not know that the means of identification he is using belongs to another person.

1. The facts of this case are undisputed. In 2000, petitioner Flores-Figueroa, a citizen of Mexico, used a false social security number and resident alien card to secure employment at L & M Steel Services, Inc., in East Moline, Illinois. U.S. C.A. Br. 3. The cards were in the name Horatio Ramirez, but neither number was actually issued to anyone of that name,

and the social security number had never been issued to anyone. *Id.* at 1, 5.[1]

After working at the company for six years, petitioner decided that he would like to work under his real name. He traveled to Chicago and purchased forged social security and permanent resident cards bearing his name. U.S. C.A. Br. 3-6. Although petitioner knew that the numbers on the cards did not belong to him, he did not know whether they belonged to another person or were like his original false social security number simply fabricated and belonged to no one. U.S. C.A. Br. 6.

Petitioner then presented the new documents to his employer and asked that it change his employment records accordingly. Petitioner's employer reported the request to U.S. Immigrations and Customs Enforcement, which determined that the numbers on the documents had been issued to other actual persons. U.S. C.A. Br. 5. There is no evidence that petitioner's use of those numbers caused any injury to the persons to whom the numbers actually belonged.

3. After being indicted by a federal grand jury, petitioner pled guilty to two counts of misuse of immigration documents (18 U.S.C. § 1546) for his use of the social security and permanent resident numbers, and one count of illegal entry into the United States (8 U.S.C. § 1325). However, petitioner

[1] Although the record does not disclose whether the resident alien number had been issued to a real person, the Government never alleged that it had.

pled not guilty to two additional charges of aggravated identity theft (18 U.S.C. § 1028A). Pet. App. 2a; U.S. C.A. Br. 1.

During the bench trial that followed, petitioner testified that he purchased the documents without knowing that the numbers belonged to real people. U.S. C.A. Br. 6. The Government did not challenge that testimony or present any evidence to the contrary.

At the close of evidence petitioner moved for judgment of acquittal on the aggravated identity theft charges, arguing that the Government had not established that he knew that the social security and permanent resident numbers he used had been assigned to other people. Pet. App. 2a. The district court denied the motion, agreeing with the Government that such proof was not required under the statute. *Id.*

The district court sentenced petitioner to 51 months' imprisonment for the misuse of immigration documents and his illegal entry into the United States. Pet. App. 6a. In addition, as required by Section 1028A, the court imposed an additional mandatory two-year sentence for the aggravated identity theft counts, to be served consecutive to the other sentences. *See* Pet. App. 6a; 18 U.S.C. § 1028A(b). Accordingly, petitioner was sentenced to a total of 75 months' imprisonment. Pet. App. 2a-3a.

On appeal, petitioner renewed his objection to the sufficiency of the evidence to support his aggravated identity theft conviction. Relying on its recent decision in *United States v. Mendoza-Gonzalez*, 520 F.3d 912 (8th Cir. 2008), *petition for*

cert. filed (U.S. July 15, 2008) (No. 08-5316) which had rejected the same challenge to the Government's interpretation of Section 1028A(a)(1) the court of appeals affirmed the judgment. Pet. App. 3a. That decision had concluded that

> [T]he plain language of § 1028A(a)(1) limits "knowingly" to modifying "transfers, possess, or uses" and not "of another person." Thus, we conclude that § 1028A(a)(1) is unambiguous and that the Government was not required to prove that [the defendant] knew that [the person's whose means of identification he used] was a real person to prove he violated § 1028A(a)(1).

520 F.3d at 915.

SUMMARY OF ARGUMENT

As its name suggests, the "Aggravated identity theft" statute punishes an especially serious form of stealing. By common understanding and legal tradition, there is an important difference between accidental misappropriation and intentional theft. Taking another person's property without knowing that it belongs to someone else as might happen, for example, when taking in a neighborhood cat, wrongly thinking it is a stray may be a civil tort (you have to give the cat back), but it is not criminal "theft." The statutory definition of "Aggravated identity theft" tracks that distinction, punishing only those who "*knowingly* . . . use[], without lawful authority, the means of identification of another person." 28 U.S.C. § 1028A(a)(1) (emphasis added).

The court of appeals' construction of this provision reading the word "knowingly" as

modifying only the provision's verbs and not the direct object ("means of identification of another person") is inconsistent not only with traditional conceptions of theft, but also with the most natural understanding of the provision's language. In common usage, a state-of-mind adverb that modifies a transitive verb is understood to reach its direct object as well. To say "Jane knowingly took that cat of Mr. Smith's" is to convey that Jane not only knew that she took *something* (which turned out to be a cat belonging to Mr. Smith) but also that she knew that what was she was taking was a cat and that it belonged to Mr. Smith. That would be particularly clear if the speaker prefaced the statement by calling Jane a thief.

So, too, a statutory provision labeled "Aggravated identity theft," and prohibiting knowingly "us[ing] . . . the means of identification of another person" strongly conveys the requirement that the defendant knew that the means of identification he was using belonged to another person. Without such knowledge, the defendant is simply committing identity fraud, which is a separate offense punished elsewhere (a fact of which Congress was obviously aware, as it made some forms of identity fraud predicate offenses for aggravated identity theft).

Petitioner's reading also is consistent with the principal purpose of the Act, which was to provide a harsh penalty for the most severe forms of identity theft. Rather than targeting the most culpable identity thieves, the court of appeals' construction casts an indiscriminate net, drawing in both the serious identity thieves Congress had in mind (like a person who seeks out social security numbers of real

people in order to empty their bank accounts) and a random selection of identity fraud defendants who unknowingly pick identification numbers that belong to real people. Indeed, the court of appeals' interpretation would even ensnare someone who, during the course of an enumerated felony (like mail fraud), accidentally garbles the digits in his own identification number and has the misfortune of landing upon a number that was assigned to someone else. While such individuals are surely deserving of punishment for their underlying felonies, they are hardly the people one would expect Congress to intend to punish additionally, and severely, as aggravated identity thieves.

To be sure, requiring the Government to prove that a defendant knew that the means of identification he was using belonged to another person makes aggravated identity theft prosecutions somewhat more difficult. But that is no reason to read even an ambiguous statute in favor of the Government the rule of lenity requires the opposite and here the statutory language, structure, backdrop, and purposes all support the requirement. If Congress thinks that it would be better to dispense with that knowledge element of the offense, it is of course free to do so. But until it does, this Court should give the text of Section 1028A(a)(1) its ordinary meaning.

ARGUMENT

Petitioner does not contest that in using false identification documents to obtain employment in the United States, he committed acts of identification *fraud*, for which he pled guilty and was sentenced to more than four years' imprisonment. Pet. App. 6a. The question before the Court is whether he also committed "Aggravated identity *theft*" within the meaning of 18 U.S.C. § 1028A(a)(1) (emphasis added), even though he had no intention of stealing anyone's identity and did not, in fact, know that the identification numbers he was using actually belonged to other people. The answer to that question is "no."

I. The "Aggravated Identity Theft" Statute Requires Proof That The Defendant Knew That The Means Of Identification He Used Belonged To Another Person.

A. The Text and Structure Indicate Congress's Intent To Extend The Provision's Knowledge Requirement To "Of Another Person."

The Court's inquiry begins, of course, with the text. *Staples v. United States*, 511 U.S. 600, 605 (1994). And because federal crimes "'are solely creatures of statute,' . . . [d]ue respect for the prerogatives of Congress in defining federal crimes prompts restraint in this area." *Dowling v. United States*, 473 U.S. 207, 213 (1985) (citations omitted). Indeed, the "rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself." *United States v. Wiltberger*, 18

U.S. 76, 95 (1820). Thus, in construing criminal statutes, the Court "typically find[s] a 'narrow interpretation' appropriate." *Dowling*, 473 U.S. at 213 (citation omitted).

1. In Section 1028A(a)(1), the adverb "knowingly" is followed by a series of transitive verbs ("transfers, possesses, or uses") which are then followed by a direct object phrase ("means of identification of another person"). In common usage, a state-of-mind adverb like "knowingly" is ordinarily understood to apply not only to adjacent verbs, but also to any direct object that may follow. *See generally* Brief of Professors of Linguistics §§ A-B.

Consider, for example, the following statements:

(1) John knowingly discarded his sister's homework.

(2) Jane knowingly ate the last slice of pizza.

Under the Eighth Circuit's rule of grammar, the first sentence would be true so long as John knew he was discarding something, even if he thought it was waste paper or his own homework. Although that reading might be grammatically possible, in common usage the sentence is understood to convey that John knew that he was discarding something, that he knew that the something was homework, and that he knew that the homework belonged to his sister. That is, the knowledge requirement extends to the direct object and, indeed, to the entirety of the direct object phrase.

Likewise, in the second example, if the word "knowingly" modifies only the verb "eat," the sentence is true even if Jane thought she was eating a piece of pita bread or believed that there was more

pizza in the refrigerator. But no speaker of English would think that this was the intended meaning of the sentence.

It is thus unsurprising that the Government has conceded elsewhere that the knowledge requirement of Section 1028A(a)(1) is not limited to the provision's verbs but extends, at least in part, to the verbs' direct object phrase. *See United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1238 (D.C. Cir. 2008) ("As the government concedes, the mens rea requirement must extend at least to the direct object's principal modifier, 'of identification.'").

Having made that reasonable concession, it is hard to see how the Government can maintain that, as a linguistic matter, the knowledge requirement can only be read to extend to "means of identification" but not to the qualifying phrase "of another person." Once the word "knowingly" is "emancipated from merely modifying the verbs," and is conceded to extend to the verbs' direct object, then "as a matter of grammar it is difficult to conclude that the word 'knowingly' modifies one of the elements in [the subsection,] but not the other." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77-78 (1994). The direct object of the provision's verbs, after all, is the entirety of the phrase "means of identification of another person." *See* Linguists' Br. § B.

Consider, for instance, these examples:

(3) John knowingly ate a bushel of his neighbor's apples.

(4) John knowingly ate a bushel of apples of his neighbor's.

A normal English speaker would understand either sentence to mean that John knew not only that he had eaten something, or even that he had eaten a bushel of appels. One would understand the sentences to assert as well that John knew that the bushel of apples belonged to his neighbor. That is, the reader would think that the word "knowingly" extends not only to the verb "ate" and to the direct object noun "bushel," but also to the rest of the direct object phrase, however expressed.

Indeed, the focus of the adverb in both sentences (and in many others like them) is on the words modifying the direct object noun. One normally would not think that "knowingly" was inserted in the sentences, for example, to make clear that John didn't *accidentally* eat the apples when he really meant just to smell them, or was meant to make clear that John knew that what he was eating was a bushel of apples, not oranges. The focus instead is on John's knowledge that the bushel of apples belonged to his neighbor; that is, on the words at the very end of the direct object phrase.

The same is true of similarly constructed statutes. The "normal, commonsense reading of a subsection of a criminal statute introduced by the word 'knowingly' is to treat that adverb as modifying each of the elements of the offense identified in the remainder of the subsection." *X-Citement Video, Inc.*, 513 U.S. at 79 (Stevens, J., concurring). Of course, Congress can demonstrate a different intent through grammatical or structural cues. *See, e.g., id.* at 67-68. But there is nothing in the language of Section 1028A(a)(1) to signal to the reader that the knowledge requirement unexpectedly stops half-way

through the phrase "means of identification of another person."

2. The most natural reading of the language of Section 1028A(a)(1) is confirmed by the structure and accepted meaning of its immediate neighbor, Section 1028A(a)(2). That subsection provides:

> **(2) Terrorism offense.** Whoever, during and in relation to any felony violation enumerated in section 2332b(g)(5)(B), knowingly transfers, possesses, or uses, without lawful authority, **[1]** a means of identification of another person or **[2]** *a false identification document* shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 5 years.

18 U.S.C. § 1028A(a)(2) (emphasis added).

The Government conceded in the D.C. Circuit that this provision requires it to prove that a defendant charged with using a "false identification document" knew that the identification document was, in fact, false. *Villanueva-Sotelo*, 515 F.3d at 1239. That is, the Government agreed that the knowledge requirement extends to the entire direct object phrase "false identification document," including the word "false" which qualifies the direct object noun phrase ("identification document"), just as the words "of another person" qualifies the direct object noun phrase "means of identification" in the prior clause. The Government's position thus requires the Court to accept one of two implausible propositions: (a) that the knowledge requirement in Section 1028A(a)(2) hopscotches among the

provision's various elements, landing on the verbs and the words "means of identification" before leaping over "of another person" to alight on "false identification document"; or (b) that the knowledge requirement applies to the "of another person" element in the terrorism offense provision but not in its immediate predecessor provision, Section 1028A(a)(1).

The more sensible reading is that Congress intended the knowledge requirement to extend to the entirety of the direct object phrase in every instance, consistent with ordinary usage.

B. The Natural Reading Of The Text Is Consistent With The Traditional Conception Of "Theft" And The Treatment Of Mens Rea Requirements In Criminal Statutes.

Petitioner's construction of the statute also draws support from the legal backdrop against which it was enacted, including the traditional understanding of theft and longstanding presumptions about the scope of mens rea requirements in criminal statutes.

1. Traditional Understanding Of "Theft"

This is not the first time this Court has been required to construe the mens rea element of a federal statute criminalizing a form of theft.

In *United States v. Morissette*, 342 U.S. 246 (1952), a defendant was accused of "knowingly . . . convert[ing] property of the United States," 18 U.S.C. § 641, after he gathered and sold seemingly abandoned scrap metal that, unbeknownst to him,

belonged to the U.S. Air Force. *Morissette,* 342 U.S. at 247. The question in this Court was whether the Government was required to prove that the defendant knew that that the property was not abandoned but instead belonged to someone else. In reversing the conviction, this Court explained that

> where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.

Id. at 263. In light of that principle, this Court assumed that in proscribing "knowing conversion" a "larceny-type offense," *id.* at 271 Congress incorporated the traditional requirement that the defendant know that the property he took belonged to another. *Id.* at 270-71. And because the trial court had not required the prosecution to prove that element, the Court reversed his conviction. *Id.* at 276.

The same principles should lead to the same result in this case.

In enacting Section 1028A(a)(1), Congress criminalized a form of theft. Indeed, the provision is expressly entitled "Aggravated identity *theft*," 18 U.S.C. § 1028A (emphasis added), and was enacted as part of the "Identity *Theft* Penalty Enhancement Act," Pub. L. 108-275, § 1, 118 Stat. 831 (2004) (emphasis added). The legislative history likewise

demonstrates that Congress viewed Section 1028A as punishing a type of theft, albeit in a new and modern context.[2]

And as the decision in *Morissette* illustrates, an essential element of theft is the knowledge that the property misappropriated in fact belongs to another. *See* 342 U.S. at 270-73.[3] Thus, theft "cannot be committed, unless the goods taken appear to have an owner, and the party taking must know or believe that the taking is against the will of that owner."

[2] *See, e.g.*, H.R. Rep. 108-528, at 3 (2004), *as reprinted in* 2004 U.S.C.C.A.N. 779, 779 (explaining that that the object of the provision was to address the "the growing problem of identity *theft*," and target "persons who *steal* identities," *i.e.*, "identity thieves") (emphases added); *Hearing on H.R. 1731 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 108th Cong. (2004) (statement of Timothy Coleman, Counsel to Assistant Att'y Gen., Crim. Div., Dep't of Justice) (testimony explaining that "a person commits aggravated identity theft by *stealing* someone's identity in order to commit a serious federal predicate offense") (emphasis added).

[3] *See also e.g.*, O.W. HOLMES, JR., THE COMMON LAW 71 (1881) (explaining that larceny is "'the taking and removing, by trespass, of personal property *which the trespasser knows to belong either generally or specially to another*, with *intent* to deprive such owner of his ownership therein'") (emphasis added) (citation omitted); BLACK'S LAW DICTIONARY 1516 (8th ed. 2004) (defining "theft" as the "felonious taking and removing of another's personal property *with the intent of depriving the true owner of it*") (emphasis added); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2369 (1993) ("[T]he act of stealing; *specif*: the felonious taking and removing of personal property *with intent to deprive the rightful owner of it.*") (emphasis added).

Regina v. Thurborn, 169 Eng. Rep. 293, 293-94 (1848). For example, "to take a horse running at large on the range is not larceny in the absence of an intent to deprive an owner of his property." *Morissette*, 342 U.S. at 261 n.19 (citing *Johnson v. State*, 36 Tex. 375 (1871)); *see also, e.g.*, 2 RUSSELL ON CRIMES 98 (1828) (same for accidental misappropriation of neighbor's sheep); *Regina v. Riley*, 169 Eng. Rep. 674 (1853) (same).

Certainly nothing in the text or legislative history of Section 1028A suggests that Congress intended to abandon this defining aspect of the traditional understanding of theft. The House Report accompanying the Act includes a list of cases illustrating the type of conduct Congress intended to cover. H.R. Rep. No. 108-528, at 5-6, 2004 U.S.C.C.A.N. at 781-82. In most (if not all) of the examples, the defendant clearly knew that the identification he or she was using belonged to another person. *See Villanueva-Sotelo*, 515 F.3d at 1244. For example, the Report discusses a customer service representative using his position to access personal consumer credit information from three credit reporting agencies a scheme that allowed him to access the personal information of 30,000 victims. H.R. Rep. No. 108-528, at 5, 2004 U.S.C.C.A.N. at 781. Another case involved a health club employee who stole credit card data from members, and provided the stolen identity information to an associate convicted of conspiracy to bomb the Los Angeles International Airport in 1999. *Id.* The one example relating to immigration likewise fits squarely within the traditional notions of theft: a Mexican citizen obtained federal benefits by using

the name and social security number of his former brother-in-law, a U.S. citizen. *Id.* at 6, 2004 U.S.C.C.A.N. at 782.

And although the state of the defendants' knowledge in other examples might be subject to debate, *see United States v. Godin*, 534 F.3d 51, 59-61 (1st Cir. 2008), at the very least none plainly encompasses an instance in which a defendant simply used an identification number that, unbeknownst to him, turned out to have been assigned to another person. *See Villanueva-Sotelo*, 515 F.3d at 1245.

The same is true of the examples raised in the floor discussion of the Act. Representative Carter, the author of the Act, stated that the Act would "facilitate the prosecution of criminals who *steal* identities," such as a student at the University of Texas who stole 55,000 Social Security numbers from a university database. 150 Cong. Rec. H4808, H4810 (2004) (emphasis added). He also gave the example of a former motor vehicles clerk who pleaded guilty to stealing information from immigration papers to sell identification cards to undocumented immigrants. *Id.* Notably, although his statement made clear that he viewed the clerk as an identity thief, Representative Carter did not suggest that the immigrants who received the false identification cards were subject to the Act. *Id.*

2. *Presumption That Mens Rea Requirements Apply To All Facts That Make The Defendant's Conduct Unlawful*

Congress also enacted Section 1028A(a)(1) against the backdrop of this Court's tradition of construing "criminal statutes to include *broadly applicable* scienter requirements." *X-Citement Video, Inc.*, 513 U.S. at 70 (emphasis added). Thus, absent significant reason to believe that Congress intended otherwise, "a conventional *mens rea* element . . . require[s] that the defendant know the facts that make his conduct illegal." *Staples*, 511 U.S. at 605; *see also Dixon v. United States*, 548 U.S. 1, 5 (2006) ("[U]nless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense.") (quoting *Bryan v. United States*, 524 U.S. 184, 193 (1998) (footnote omitted)); *Rogers v. United States*, 522 U.S. 252, 254-55 (1998) (plurality opinion) (applying presumption to federal firearms statute). Thus, for example, in *Morissette*, the Court explained that in light of tradition, "knowing conversion requires . . . . [that the defendant] must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion." 342 U.S. at 270-71.[4]

[4] There are exceptions to the presumption, including with respect to "jurisdictional" elements that go to the forum for prosecuting the crime rather than the criminality of the act. *See, e.g., United States v. Feola*, 420 U.S. 671, 683-85 (1975). But no such exceptions applies here.

By the time Congress enacted Section 1028A, this presumption was widely recognized[5] and, in fact, had been codified as a principle of construction in the Model Penal Code for more than 40 years. Section 2.02(4) of the Code, adopted in 1962, provides:

> When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

MODEL PENAL CODE § 2.02(4) (1985).

When considering the proper interpretation of federal statutes, this Court has often looked to the Model Penal Code.[6] Here, the general interpretive

[5] *See, e.g.*, John Shepard Wiley, Jr., *Not Guilty By Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1113 (1999) ("Where Congress has expressly prescribed a definite culpability requirement somewhere in the statute, the Court . . . appl[ies] this express kind of culpability to all material elements of the statute.").

[6] *See, e.g.*, *United States v. Resendiz-Ponce*, 549 U.S. 102, 107 (2007) (citing the Code definition of attempt when construing 8 U.S.C. § 1326(a)); *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 408-410 (2003) (relying on the Code when interpreting 18 U.S.C. § 1951); *United States v. Bailey*, 444 U.S. 394, 404-05, 408 (1980 (citing the Code when discerning the *mens rea* requirement of 18 U.S.C. § 751(a)); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437-38 (1978) (noting the Code's influence in defining *mens rea*, and as support for the "generally disfavored status" of strict-liability offenses).

principle suggested by the Code accords with this Court's own tradition and performs a valuable function in "giving legislators a predictable background rule against which to legislate." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994). It is also consistent with the rule of lenity, requiring a clear indication that Congress has intended to abandon tradition in favor of a more expansive definition of the crime. *See, e.g.*, *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 408-09 (2003); *infra* at 34-38.

Of course, "[p]rinciples derived from common law as well as precepts suggested by the American Law Institute must bow to legislative mandates," when a statute indicates a contrary congressional intent. *United States v. Bailey*, 444 U.S. 394, 406 (1980). But in this case, the background principle applied by this Court and suggested by the Model Penal Code aligns with the most natural reading of the text and, as discussed next, the underlying purposes of the legislation.

C. Petitioner's Reading Is Consistent With The Statute's Purposes.

In enacting the aggravated identity theft provision, Congress focused on serious misconduct warranting extraordinary punishment above and beyond the penalties provided for the predicate offense. *See, e.g.*, H.R. Rep. No. 108-528, at 9, 2004 U.S.C.C.A.N. at 785 (noting that purpose of the Act was to "address the *most serious criminals*") (emphasis added); *Hearing on H.R. 1731 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 108th

Cong. (2004) (statement of Timothy Coleman, Counsel to the Assistant Att'y Gen., Crim. Div., Dep't of Justice) (testifying that the Act "would greatly help to ensure that the Department has the tools it needs to prosecute effectively, and punish appropriately, the *most serious forms* of identity theft") (emphasis added). Congress's focus on especially serious misconduct is illustrated by the extraordinary punishment it established for aggravated identity theft, requiring not only a mandatory two-year sentence, but also going to great lengths to ensure that the sentence would be served in prison and consecutively to the sentence for the predicate (or any other) offense. *See* 18 U.S.C. § 1028A(b).

Petitioner's construction of the statute is in keeping with these purposes. First, petitioner's reading reserves the severe punishment of Section 1028A for the most serious offenses, in which identity thieves knowingly obtain the means of identification of other persons, often for the purpose of exploiting victims and their good names.

Second, petitioner's construction sensibly distinguishes between the punishment due for the identity *fraud* which is punished elsewhere, often severely[7] and the additional punishment Congress intended for fraud used to commit identity *theft*. Under the Eighth Circuit's interpretation, that

[7] *See, e.g.*, 18 U.S.C. § 1425 (unlawful attempt to procure citizenship) (up to twenty-five years); 18 U.S.C. § 1546(a) (use of false document to obtain immigration papers) (up to twenty-five years); 18 U.S.C. § 1546(b) (misuse of immigration documents) (up to five years).

additional punishment is applied even when all the defendant has done beyond the act of identity fraud is to have had the misfortune of picking identification numbers that happen to belong to another person. Indeed, someone who accidentally transposes the numbers of his own social security number in the course of committing a predicate offense say a Ponzi scheme in violation of the mail fraud statute would be considered an identity thief under the court of appeals' interpretation if it turns out that the garbled number happens to belong to someone else. The statue so construed would arbitrarily subject individuals with substantially identical culpability to dramatically different punishments. *See generally* BERNARD WILLIAMS, MORAL LUCK: PHILOSOPHICAL PAPERS 1973-1980 (1981).

At the same time, under the court of appeals' interpretation, the law draws *no* distinction between defendants with significantly *different* levels of culpability. A defendant like petitioner is treated no differently than a defendant who intentionally steals thousands of credit card numbers and bilks their owners out of hundreds of thousands of dollars. Not only are both convicted of the same offense, but because Section 1028A imposes a mandatory two-year sentence allowing the sentencing judge no discretion to raise or lower the sentence to reflect different levels of culpability the two defendants get exactly the same sentence.[8]

[8] As discussed below, the displacement of traditional sentencing discretion is a reason for vigilant application of the rule of lenity. *See infra* 37-38.

Petitioner's construction draws a more sensible line, limiting Section 1028A to individuals who engage in significantly more culpable conduct, while nonetheless ensuring that those guilty of identity fraud or immigration offenses are subject to appropriate punishment for their misconduct.[9]

II. The Court Of Appeals' Reasons For Giving Section 1028A(a)(1) An Expansive Interpretation Lack Merit.

The arguments in favor of a broader construction of Section 1028A are unconvincing, especially in view of the rule of lenity.

A. The Text Does Not Unambiguously Limit "Knowingly" To The Provision's Verbs.

The court of appeals offered two reasons for its conclusion that the text of Section 1028A(a)(1) "unambiguous[ly]" "limits 'knowingly' to modifying 'transfers, possesses, or uses' and not 'of another person.'" *Mendoza-Gonzalez*, 520 F.3d at 915. Neither is persuasive.

1. First, the court explained that "'Knowingly' is an adverb, and '[g]ood usage requires that the limiting modifier, the adverb 'knowingly,' be as close

[9] To the extent the culpability for identity fraud is heightened by the fact that a defendant unknowingly used a means of identification belonging to another person, that fact presumably can be taken into account in setting the punishment for the identity fraud.

as possible to the words which it modifies." *Id.* at 915 (citation omitted) (alteration in original).

Whatever value this advice has as a general matter, it is of little assistance to the specific question here.[10] As shown above, words like "knowingly" commonly extend beyond neighboring verbs. And in the context of a statute establishing the mens rea element of a crime, "[c]ases holding that 'knowingly' extends to words and phrases other than verbs are legion." *Godin*, 534 F.3d at 56-57 (collecting cases).

Moreover, in this case, limiting "knowingly" to the verbs it abuts leads to a conclusion that even the Government acknowledges cannot be right. *See supra* at 10. It would, for example, allow the criminal prosecution of a person who knowingly transfers an

[10] The advice is most aptly directed at an ambiguity — not presented in Section 1028A(a)(1) — as to which of several verbs, adjectives, or adverbs in a sentence the adverb modifies. Consider for example:

(5) The marathoners submitted their applications to compete *immediately*.

In this formulation, it is entirely unclear whether the adverb "immediately" modifies the verb "compete" or the verb "submitted." Placing the adverb closer to the verb it was intended to modify would eliminate that ambiguity. CHICAGO MANUAL OF STYLE ¶ 5.155 (15th ed. 2003). Similarly, the placement of the adverb "nearly" changes the meaning in the following sentences by making clear whether it modifies the verb "lost" or the adjective "all":

(6) We *nearly* lost all our camping equipment.

(7) We lost *nearly* all our camping equipment.

envelope from one person to another, having been told, and reasonably believing, that it contains a birthday card when it really contains a stolen Social Security card. Because there would be no question that the defendant knew that he was transferring something, the knowledge requirement of Section 1028A(a)(1) would be satisfied under the Eighth Circuit's interpretation. But that result makes no sense and Congress could not have intended it.

2. The court of appeals also sought support from the so-called "last antecedent rule." *Mendoza-Gonzalez*, 520 F.3d at 915. That rule suggests that "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). For example, if a sign announces discounted movie tickets for "students, seniors, and children under the age of eight," the qualifying phrase "under the age of eight" is most likely meant to apply to children and not to seniors or students.

The rule has no application here. For one thing, this case does not involve any question about the modification of antecedents. The verbs in Section 1028A(a)(1) *succeed* rather than *antecede* the qualifying word "knowingly."[11] And as far as

[11] Apparently aware of the mismatch, the court of appeals attempted to define the "antecedent" requirement out of the "last antecedent" rule, describing the rule as holding that "qualifying words and phrases usually apply only to the words or phrases immediately preceding *or following* them, not to others that are more remote." *Mendoza-Gonzalez*, 520 F.3d at 915 (emphasis added). But that is not how this Court, or general authorities, have ever described the rule. *See, e.g.*,

petitioner can determine, this Court has never applied the "last antecedent" rule to anything other than antecedents.[12]

In addition, this Court has never applied the last antecedent rule to an adverb like "knowingly," the placement of which is far less informative in determining its reach.[13] Instead, as discussed above, such words are most naturally understood as having a broader reach and, when used to establish the mens rea element of a crime, are subject to other more specific presumptions. *See supra* at 9-12, 18-20.

3. The court of appeals' textual analysis also conflicts with this Court's decision in *Liparota v. United States*, 471 U.S. 419 (1985). In that case, the Court construed a statute criminally punishing

Barnhart, 540 U.S. at 26; N. SINGER & J.D. SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 47:33 (7th ed. 2007) ("Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent.").

[12] *See, e.g., Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 344 (2005); *Barnhart*, 540 U.S. at 26; *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 330 (1993); *United States v. Bass*, 404 U.S. 336, 339-40 & n.6 (1971); *Fed. Trade Comm'n v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959); *Johnson v. Sayre*, 158 U.S. 109, 114 (1895); *Scott v. Jones*, 46 U.S. (5 How.) 343, 357 (1847); *Ex parte Bollman & Ex parte Swartwout*, 8 U.S. (4 Cranch) 75, 93 (1807).

[13] Consider, for example, the following sentences:

(8) John *knowingly* discarded his sister's homework.

(9) John discarded his sister's homework *knowingly*.

The placement of the adverb does not alter the meaning of the sentence.

anyone who "knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by" law. *Id.* at 420 n.1 (quoting 7 U.S.C. § 2024(b)(1) (1982)). The question was whether the knowledge requirement extended to the phrase "in any manner not authorized by" law, thereby requiring proof that the defendant knew that his conduct was unlawful. *Id.* at 423. Under the Eighth Circuit's grammar rule, that question should have been easy the adverb should have been understood as unambiguously limited to the verbs and would not extend any further. But this Court reached a contrary conclusion:

> Although Congress certainly intended by use of the word "knowingly" to require *some* mental state with respect to *some* element of the crime defined in § 2024(b)(1), the interpretations proffered by both parties accord with congressional intent to this extent. Beyond this, the words themselves provide little guidance. Either interpretation would accord with ordinary usage.

Id. at 424 (emphasis in original). The ambiguity it confronted, the Court observed, is common in statutes with knowledge requirements. It noted that "[o]ne treatise has aptly summed up the ambiguity in an analogous situation":

> Still further difficulty arises from the ambiguity which frequently exists concerning what the words or phrases in question modify. What, for instance, does "knowingly" modify in a sentence from a "blue sky" law criminal statute punishing one who "knowingly sells a security without a permit"

> from the securities commissioner? To be guilty must the seller of a security without a permit know only that what he is doing constitutes a sale, or must he also know that the thing he sells is a security, or must he also know that he has no permit to sell the security he sells? As a matter of grammar the statute is ambiguous; it is not at all clear how far down the sentence the word "knowingly" is intended to travel whether it modifies "sells," or "sells a security," or sells a security without a permit."

Id. at 424 n.7 (quoting W. LAFAVE & A. SCOTT, CRIMINAL LAW § 27 (1972)).

That conclusion is starkly at odds with the Eighth Circuit's insistence that the knowledge requirement of Section 1028A is necessarily and unambiguously limited to the provision's verbs. The court of appeals attempted to distinguish *Liparota* on the ground that this Court gave the provision before it an expansive interpretation to avoid criminalizing otherwise innocent conduct. *Mendoza-Gonzalez*, 520 F.3d at 917-18. But this Court relied on that concern "[i]n addition" to the rule of lenity, 471 U.S. at 427 only *after* finding that the grammatical formulation in the provision was inherently ambiguous. 471 U.S. at 424 & n.7.

Even more, the Court found the statute grammatically ambiguous only with respect to a question far more difficult than the one the Court confronts in this case. In *Liparota*, the Court did not doubt that the knowledge requirement extended at least as far as the direct object of the operative verbs, requiring the Government to prove that the

defendant knew he was using "coupons or authorization cards." *See id.* 424. The harder question, upon which the Court found the statute ambiguous, was whether the knowledge requirement extended beyond that to the additional phrase "in any manner not authorized by" law. *Id.* at 423. And that question was difficult not only because it required extending the knowledge requirement beyond the direct object phrase, but also because of the traditional presumption that "ignorance of the law is no excuse." *Bryan v. United States*, 524 U.S. 184, 195 (1998).[14]

No such difficulties arise in this case. And as a result, *Liparota* not only squarely contradicts the court of appeals' conclusion that the word "knowingly is unambiguously limited to the verbs it precedes, but strongly supports petitioner's alternative reading of the statute.

4. In the end, the Eighth Circuit is reduced to relying on the fact that Congress could have written the provision to extend the knowledge requirement to

[14] The Court thus did not advert to the risk of criminalizing otherwise innocent conduct to overcome some general grammatical rule limiting knowledge requirements to verbs. *See Liparota*, 471 U.S. at 426-27. Likewise, in *X-Citement Video*, the Court relied on concerns about innocent conduct not because it thought that the word "knowingly" ordinarily modifies only the verbs it precedes, but rather to overcome strong textual cues that the knowledge requirement did not extend as far as the defendant contended. *See* 513 U.S. at 68. (noting that knowledge requirement would not ordinarily reach elements "set forth in independent clauses separated by interruptive punctuation"). No such barriers exists in this case.

the "of another person element" in even clearer terms. *See Mendoza-Gonzalez*, 520 F.3d at 915 (citation omitted). This may be true. Congress could, for example, have applied the provisions to one who "*knowingly* transfers, possesses, or uses, what he *knows* to be a means of identification belong to another *known* person, *knowing* that he lacked lawful authority to do so." It could have said something similar in *Liparota* and *Morissette* as well. But that kind of repetition is awkward and, in fact, is never used in speech or statute. Moreover, as shown above, the formulation Congress did use is reasonably clear and consistent with ordinary usage and legal tradition.

B. The Eighth Circuit's Misreading Of The Text Is Not Justified By Any Statutory Purpose.

The court of appeals' analysis of the purposes of the statute does nothing to overcome the weakness of its textual analysis.

1. Protecting Victims

The Eighth Circuit regarded its interpretation as consistent with Congress's intent to apply Section 1028A whenever a defendant "wrongfully obtains and uses *another person's* personal data." *Mendoza-Gonzalez*, 520 F.3d at 916 (emphasis in original) (internal quotation marks and citation omitted). After all, the Government points out, "the harm experienced by the victim whose identity has been misappropriated does not vary depending on the defendant's knowledge of his existence." *Mendoza-Gonzales* BIO 9. This argument is unpersuasive.

As an initial matter, the premise of the argument is doubtful. It is by no means self-evident that the harm to victims is the same regardless of whether the defendant accidentally picks an identification number belonging to another person or if the defendant seeks out a number he knows belongs to another person with the intention of stealing the victim's identity. And, in fact, the Federal Trade Commission reported to Congress that the most serious cases of identity theft . that is, those instances causing the most harm tend to involve a thief who knows his or her victim. Synovate, Fed. Trade Comm'n, IDENTITY THEFT SURVEY REPORT 28 (2003) ("Knowledge of the thief's identity is more likely when the crime involves more serious cases of Identity Theft."). Additionally, the Commission found that the vast majority of victims eighty-five percent report misuse of their existing accounts as the harm suffered. *Id.* at 33. In both categories of cases, the identity thief almost by definition has chosen a particular false identification precisely *because* he knows that it belongs to another actual person. Similarly, in describing its most important identity theft prosecutions, the Department of Justice has identified cases in which the defendant used stolen identities that the thief knew belonged to real people. Pres. Identity Theft Taskforce, COMBATING IDENTITY THEFT: VOLUME II, at 48-49 (2007). Such victimization presumably is less likely when the defendant does not even know that the victim exists.

At any rate, even if it were true that unknowing misappropriation of a means of identification posed the same harm to victims as intentional identity theft, that would be no reason to assume Congress

intended to elide this distinction in Section 1028A. The law commonly draws distinctions among offenses imposing the same harm or risk upon victims. The most obvious example is homicide — although the effect on the victim is the same, the punishments for negligent homicide, manslaughter, and premeditated murder vary enormously. Closer to home, the law also has long distinguished between accidental misappropriation (a civil tort) and intentional theft (a serious crime), even though the loss to the true owner is identical. *See Morissette*, 342 U.S. at 270-72.

Such distinctions persists because although the harm to victims is important, the degree of criminal punishment ordinarily hinges most importantly on the defendant's culpability, *see* Prof. of Crim. Law Br. § II, which in turn generally depends substantially on what he knew or intended. And there is no escaping the fact that there is a significant difference between the culpability of someone who uses an identification number not knowing that it belongs to someone else, and an intentional identity thief.

2. Facilitating Prosecutions

The court of appeals also objected that Congress could not have intended to require the Government to prove that the defendant knew that the means of identification he used in fact belonged to another person because such a requirement would "'place on the prosecution an often impossible burden.'" *Mendoza-Gonzalez*, 520 F.3d at 916 (quoting *Villaneuva-Sotelo*, 515 F.3d at 1255 (Henderson, J., dissenting)).

Again, the premise of the objection is unsound. Proof of what a defendant knew or believed is a

common part of many prosecutions, including every prosecution for theft. In *Morissette*, for example, this Court saw no impossible burden in requiring prosecutors to prove that the defendant knew that the property he had taken belonged to someone else. In such cases, the Government may rely on circumstantial evidence, which is often easily available and highly persuasive. *See Morissette*, 342 U.S. at 276; *see also, e.g.*, *Liparota*, 471 U.S. at 434. For example, how a defendant obtained the means of identification can be very probative. "[W]hen an individual obtains personal information by trolling through the victim's garbage or by improperly viewing files to which the perpetrator gains access, he obviously knows the information belongs to someone else." *Villanueva-Sotelo*, 515 F.3d at 1249. Also, in many cases the way the defendant used the means of identification can demonstrate the requisite knowledge. For example, using the identification to impersonate the victim, obtain credit, or conduct financial transactions, would make "little sense if the information at issue belonged to no one." *Id.* at 1250.

In short, there is no reason to believe that petitioner's construction of the statute would make it unduly difficult for prosecutors to convict the serious identity thieves Congress intended the statute to target. Nor does petitioner's interpretation leave the Government without recourse when the defendant did not know (or the Government cannot prove that he knew) that the false identification he was using belonged to another person. By definition, such defendants are subject to punishment under Section 1028A's predicate offenses, which provide for substantial punishment on their own.

Finally, any suggestion that the Court should construe ambiguity in a statute to facilitate prosecutions "turns the rule of lenity upside-down." *United States v. Santos*, 553 U.S. , 128 S. Ct. 2020, 2028 (2008) (plurality opinion). As discussed next, this Court "interpret[s] ambiguous criminal statutes in favor of defendants, not prosecutors." *Id.*; *see also Morrisette*, 342 U.S. at 263 (refusing "by feat of construction . . . [to do] away with the requirement of a guilty intent," in order to "ease the prosecution's path to conviction").

III. The Court Of Appeals' Interpretation Is Inconsistent With The Rule Of Lenity.

The rule of lenity "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *Santos*, 128 S. Ct. at 2025 (plurality opinion). "This principle is founded on two policies that have long been part of our tradition." *United States v. Bass*, 404 U.S. 336, 348 (1971).

> First, 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so fair as possible the line should be clear.' Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies 'the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.'

Id. (citations omitted). At the same time, the rule of lenity "places the weight of inertia upon the party that can best induce Congress to speak more clearly." *Santos*, 128 S.Ct. at 2025 (plurality opinion).

1. In this case, the most the Government could hope to show is that the text of Section 1028A is ambiguous as to the scope of the Act's *mens rea* requirement. *See Liparota*, 471 U.S. at 424 & n.7. Although the rule of lenity does not preclude the use of the "traditional tools of statutory construction," to resolve a textual ambiguity, *Caron v. United States*, 524 U.S. 308, 316 (1998) (citation omitted), the ambiguity must, in fact, be resolved. That is, the rule of lenity is not reserved for unintelligible statutes or cases in which the traditional tools of construction leave the Court in absolute equipoise. Rather, it is a "canon of strict construction of criminal statutes." *United States v. Lanier*, 520 U.S. 259, 266 (1997). If a criminal defendant is to be required to seek clarity from indirect sources beyond the text of the statute itself, those sources must speak with clarity sufficient to ensure that no "reasonable doubt persists about a statute's intended scope." *Moskal v. United States*, 498 U.S. 103, 108 (1990). And "[b]ecause construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text." *Crandon v. United States*, 494 U.S. 152, 160 (1990).[15]

[15] The rule of lenity thus places primary emphasis on the clarity of the statutory language itself. *See, e.g., Bass*, 404 U.S.

Here, the Government can point to nothing in the structure, legislative history, background legal rules, or purposes of the statute that decisively resolves any textual ambiguity in its favor. Indeed, none of the courts of appeals accepting its interpretation has done so on the strength of such evidence of legislative intent.[16] At best, the Government might argue that a broader statute would be *consistent* with Congress's general purposes in criminalizing identity theft. But that is not nearly

at 347 ("[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have *spoken in language* that is clear and definite.") (internal quotation marks and citation omitted) (emphasis added); *United States v. R.L.C.*, 503 U.S. 291, 307-10 (1992) (Scalia, J., concurring in the judgment). Giving priority to the words of the statute reflects the practical reality that few lay people will have the resources or capacity to investigate the meaning of a criminal statute through a close reading of the legislative history or other indirect inferences drawn from general purposes. At the same time, it respects the basic separation of powers principles that also underlie the doctrine, recognizing that the words of the statute are by far the best indication of congressional intent. *See, e.g.*, *Morissette*, 342 U.S. at 263 (noting that the "doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that [courts] should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the *words used in the statute*") (emphasis added).

[16] Instead, all have found — incorrectly — that the statutory language was unambiguous. *See Mendoza-Gonzalez*, 520 F.3d at 915; *United States v. Hurtado*, 508 F.3d 603, 608-10 & n.8 (11th Cir. 2007); *United States v. Montejo*, 442 F.3d 213, 217 (4th Cir. 2006).

enough. *See, e.g., Hughey v. United States*, 495 U.S. 411, 422 (1990) (explaining that "longstanding principles of lenity . . . preclude our resolution of the ambiguity against [a criminal defendant] on the basis of general declarations of policy in the statute and legislative history").

2. The rule of lenity is especially appropriate in the context of provisions like Section 1028A which impose a mandatory minimum sentence.

For one thing, ambiguous mandatory sentencing provisions pose a heightened risk of leaving defendants "languishing in prison" far longer than Congress intended if erroneously construed. *Bass*, 404 U.S. at 348 (citation omitted).

At the same time, such provisions alter the tradition balance of power between the judicial and executive branch. *See, e.g.*, AMERICAN BAR ASSOCIATION JUSTICE KENNEDY COMMISSION, RECOMMENDATIONS ON PUNISHMENT, INCARCERATION, AND SENTENCING 5, 27-28 (2004). "'It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.'" *Gall v. United States*, 128 S.Ct. 586, 598 (2007) (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996)). Mandatory minimums upset this "uniform and constant" role of judicial discretion and undermine the "notion of individualizing sentences." JUSTICE KENNEDY COMMISSION, *supra*, at 27. For example, the court of appeals' broad construction of Section 1028A(a)(1) would be less troubling if the statute permitted sentencing courts to distinguish between defendants

like petitioner and those who seek out others' identification for the express purpose of stealing their identities and emptying their bank accounts. Yet because the provision permits but a single, severe sentence, a broad construction of the statute risks disparities and injustices courts should be reluctant to assume Congress intended, absent clear instruction.

In addition, unduly broad interpretations of statutes with mandatory minimum sentences also risks aggrandizing the discretionary authority (and institutional power) of federal prosecutors, who can exercise substantial control over a defendant's eventual sentence through their unreviewable charging decisions. JUSTICE KENNEDY COMMISSION, *supra*, at 27-28; *see* Barbara S. Vincent & Paul J. Hofer, FEDERAL JUDICIAL CENTER, THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS (2004) ("The transfer of discretion from neutral judges to adversarial prosecutors tilts the sentencing system toward prosecution priorities, sometimes at the expense of other sentencing goals.").

Accordingly, this Court should not assume that Congress has altered the traditional balance of sentencing roles and authority without clear indicia of congressional intent. And because there is no such evidence here, the Court should reject the expansive interpretation given Section 1028A(a)(1) by the court of appeals in this case.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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December 15, 2008

APPENDIX

APPENDIX

Section 1028A of Title 18 provides:

§ 1028A. Aggravated identity theft

(a) Offenses.

(1) In general.—Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

(2) Terrorism offense. Whoever, during and in relation to any felony violation enumerated in section 2332b(g)(5)(B), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person or a false identification document shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 5 years.

(b) Consecutive sentence. Notwithstanding any other provision of law

(1) a court shall not place on probation any person convicted of a violation of this section;

(2) except as provided in paragraph (4), no term of imprisonment imposed on a person under this section shall run concurrently with any other term of imprisonment imposed on the person under any other provision of law, including any term of imprisonment

imposed for the felony during which the means of identification was transferred, possessed, or used;

(3) in determining any term of imprisonment to be imposed for the felony during which the means of identification was transferred, possessed, or used, a court shall not in any way reduce the term to be imposed for such crime so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for a violation of this section; and

(4) a term of imprisonment imposed on a person for a violation of this section may, in the discretion of the court, run concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28.

(c) Definition. For purposes of this section, the term "felony violation enumerated in subsection (c)" means any offense that is a felony violation of--

(1) section 641 (relating to theft of public money, property, or rewards [*]), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), or section 664 (relating to theft from employee benefit plans);

* So in original. Probably should be "records."

(2) section 911 (relating to false personation of citizenship);

(3) section 922(a)(6) (relating to false statements in connection with the acquisition of a firearm);

(4) any provision contained in this chapter (relating to fraud and false statements), other than this section or section 1028(a)(7);

(5) any provision contained in chapter 63 (relating to mail, bank, and wire fraud);

(6) any provision contained in chapter 69 (relating to nationality and citizenship);

(7) any provision contained in chapter 75 (relating to passports and visas);

(8) section 523 of the Gramm-Leach-Bliley Act (15 U.S.C. 6823) (relating to obtaining customer information by false pretenses);

(9) section 243 or 266 of the Immigration and Nationality Act (8 U.S.C. 1253 and 1306) (relating to willfully failing to leave the United States after deportation and creating a counterfeit alien registration card);

(10) any provision contained in chapter 8 of title II of the Immigration and Nationality Act (8 U.S.C. 1321 et seq.) (relating to various immigration offenses); or

(11) section 208, 811, 1107(b), 1128B(a), or 1632 of the Social Security Act (42 U.S.C. 408, 1011, 1307(b), 1320a-7b(a), and 1383a) (relating to false statements relating to programs under the Act).

RESPONDENT'S BRIEF

106

No. 08-108

SEP 19 2008

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In the Supreme Court of the United States

IGNACIO CARLOS FLORES-FIGUEROA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The federal aggravated identity theft statute prescribes a mandatory two-year term of imprisonment for any person who, "during and in relation to" certain other specified crimes, "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." 18 U.S.C. 1028A(a)(1). The question presented is whether, in order to obtain a conviction under Section 1028A(a)(1), the government must establish that the defendant knew that the "means of identification" in question belonged to another person.

In the Supreme Court of the United States

No. 08-108

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the Federal Reporter but is reprinted in 274 Fed. Appx. 501.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 2008. The petition for a writ of certiorari was filed on July 22, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty to two counts of misuse of immigration documents, in violation of 18 U.S.C. 1546(a), and one count of entering the United States without inspection, in violation of 8 U.S.C. 1325(a). Pet. App. 2a. Following a bench trial, petitioner was also

convicted of two counts of aggravated identity theft, in violation of 18 U.S.C. 1028A(a)(1). Pet. App. 2a. He was sentenced to 75 months of imprisonment, to be followed by three years of supervised release. *Id.* at 6a, 8a. The court of appeals affirmed. *Id.* at 1a-3a.

1. Section 1028A(a)(1) prescribes a mandatory two-year term of imprisonment for any person who

> during and in relation to any felony violation enumerated in [Section 1028A(c)], knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person.

18 U.S.C. 1028A(a)(1). The statute further provides that a district court "shall not place on probation any person convicted of a violation of this section," 18 U.S.C. 1028A(b)(1), nor may the term of imprisonment generally "run concurrently with any other term of imprisonment * * * including any term of imprisonment imposed for the felony during which the means of identification was transferred, possessed, or used," 18 U.S.C. 1028A(b)(2). The term "means of identification" is defined to mean "any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any * * * name, social security number, date of birth, [or] official State or government issued driver's license or identification number." 18 U.S.C. 1028(d)(7) and (7)(A).

2. Petitioner is a native and citizen of Mexico. 5/10/07 Tr. 33; Presentencing Report 2 (PSR). In 2000, petitioner began working at a steel company in East Moline, Illinois, under the assumed name of Horacio Ramirez. 5/10/07 Tr. 10-11; PSR para. 4. In 2006, petitioner told his employer that he wanted to be known as Ignacio C. Flores and to change the social security and

alien registration numbers that the employer had on file for him. 5/10/07 Tr. 10; PSR para. 4. In connection with that request, petitioner presented the employer with a counterfeit social security card and a counterfeit alien registration card. Pet. App. 2a; 5/10/07 Tr. 11, 15-16, 27; PSR para. 4. The counterfeit social security card listed a social security number that had been assigned to another person, 5/10/07 Tr. 27, and the counterfeit alien registration card contained an alien registration number that had been assigned to a different person, *id.* at 11-12, 17-18. Petitioner was in possession of the counterfeit documents when he was arrested. *Id.* at 13-16.

3. Petitioner was charged in a five-count indictment with one count of entering the United States without inspection, two counts of misuse of immigration documents, and two counts of aggravated identity theft. Pet. App. 2a, 4a-5a; Indictment 1-3. At a bench trial on the aggravated identity theft counts, petitioner moved for a judgment of acquittal on the ground that the government had not established that petitioner knew that the social security and alien registration numbers that he used had been assigned to other people. Pet. App. 2a; 5/10/07 Tr. 30. The district court denied that motion, *id.* at 32, concluding that Section 1028A(a)(1) "does not require the government to prove that [petitioner] knew that the identifying information [on the counterfeit documents] belonged to an actual individual," *id.* at 49. The court found petitioner guilty on both aggravated identity theft counts. *Id.* at 50.

4. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-3a. The court stated that its recent decision in *United States* v. *Mendoza-Gonzalez*, 520 F.3d 912 (8th Cir. 2008), reh'g denied (May 1, 2008), petition for cert. pending, No. 08-5316

(filed July 15, 2008), had "resolved th[e] issue" raised by petitioner. Pet. App. 3a. Applying the holding of *Mendoza-Gonzalez*, the court of appeals stated that the government was not required to show that petitioner "knew that the means of identification belonged to another person." *Ibid.*

DISCUSSION

Petitioner renews his contention (Pet. 16-28) that he was entitled to a judgment of acquittal on the Section 1028A(a)(1) counts because the government did not establish that he knew that the social security and alien registration numbers that he used had been assigned to other people. The court of appeals correctly rejected that claim. We agree with petitioner, however, that there is now a clear and entrenched conflict among the courts of appeals with respect to that question and that the proper interpretation of Section 1028A(a)(1) presents an important and recurring issue that warrants this Court's review. See Gov't Pet. Resp. at 7-13, *Mendoza-Gonzalez* v. *United States*, petition for cert. pending, No. 08-5316 (filed July 15, 2008).

The government has suggested that the Court grant the earlier-filed petition for a writ of certiorari in *Mendoza-Gonzalez*, which presents the same question as the petition for a writ of certiorari in this case. Pet. at ii, *Mendoza-Gonzalez*, *supra* (No. 08-5316). *Mendoza-Gonzalez* is also the case in which the Eighth Circuit issued the published decision upon which the panel relied (see Pet. App. 3a) in its brief unpublished decision in this case. Accordingly, if the Court grants review in *Mendoza-Gonzalez*, it should hold the petition for a writ of certiorari in this case pending its decision in *Mendoza-Gonzalez* and then dispose of the petition as

appropriate in light of the Court's resolution of that case.

CONCLUSION

The Court should hold the petition for a writ of certiorari in this case pending its disposition of the petition for a writ of certiorari in *Mendoza-Gonzalez* v. *United States*, petition for cert. pending, No. 08-5316 (filed July 15, 2008), and then dispose of this case accordingly.

Respectfully submitted.

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SEPTEMBER 2008

RESPONDENT'S BRIEF

No. 08-108

In the Supreme Court of the United States

IGNACIO CARLOS FLORES-FIGUEROA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The federal aggravated identity theft statute prescribes a two-year term of imprisonment for any person who, "during and in relation to" certain other specified crimes, "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." 18 U.S.C. 1028A(a)(1). The question presented is whether, in order to obtain a conviction under Section 1028A(a)(1), the government must establish that the defendant knew that the means of identification in question was that "of another person."

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statutory provisions involved 1
Statement 2
Summary of argument 4
Argument:
Section 1028A(a)(1) does not require the government to prove that the defendant knew that the means of identification in question was that "of another person" 7
A. The Statutory text and context indicate that Section 1028A(a)(1) does not require proof that the defendant knew that the means of identification in question was that of another person 8
B. Statutory purpose counsels against requiring the government to prove that the defendant knew that the means of identification was that "of another person" 19
1. The purpose of Section 1028A(a)(1) is to provide enhanced protections for victims 20
2. Requiring the government to prove that the defendant was aware of the victim's existence would undermine the statutory purpose 22
3. Neither the statute's title nor the references to "theft" and "thieves" in the legislative history warrants a different conclusion 27
C. Petitioner's proposed construction is not necessary to avoid criminalizing apparently innocent or otherwise lawful conduct 33

Table of contents—Continued: Page

D. There is no presumption that a defendant must be aware of all facts that are necessary to make his conduct unlawful or trigger an enhanced sentence 39
E. There is no reason to resort to the rule of lenity 49
Conclusion 52
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Apprendi v. *New Jersey*, 530 U.S. 466 (2000) 47
Arthur Andersen LLP v. *United States*, 544 U.S. 696 (2005) 33
BP Am. Prod. Co. v. *Burton*, 549 U.S. 84 (2006) 15
Bell v. *United States*, 462 U.S. 356 (1983) 29
Bifulco v. *United States*, 447 U.S. 381 (1980) 50
Bryan v. *United States*, 524 U.S. 184 (1998) 43
Cannon v. *University of Chicago*, 441 U.S. 677 (1979) 46
Caron v. *United States*, 524 U.S. 308 (1998) 50
Carter v. *United States*, 530 U.S. 255 (2000) .... *passim*
Chapman v. *United States*, 500 U.S. 453 (1991) 51
City of Columbus v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424 (2002) 17
Crandon v. *United States*, 494 U.S. 152 (1990) 50
Dennis v. *United States*, 341 U.S. 494 (1951) 39
Dixon v. *United States*, 548 U.S. 1 (2006) 44
Ewing v. *California*, 538 U.S. 11 (2003) 26

Cases—Continued: Page

Exxon Mobil Corp. v. *Allapattah Servs., Inc.*, 545 U.S. 546 (2005) 33
Gore v. *United States*, 357 U.S. 386 (1958) 26
Gozlon-Peretz v. *United States*, 498 U.S. 395 (1991) .. 49
Johnson v. *State*, 36 Tex. 375 (1872) 28
Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994) 45
Liparota v. *United States*, 471 U.S. 419 (1985) ..... *passim*
Manual Enters., Inc. v. *Day*, 370 U.S. 478 (1962) 44
McBoyle v. *United States*, 283 U.S. 25 (1931) 51
Morissette v. *United States*, 342 U.S. 246 (1952) 27, 28, 30, 33, 43, 48
Moskal v. *United States*, 498 U.S. 103 (1990) 49
Muscarello v. *United States*, 524 U.S. 125 (1998) 49, 50
Oncale v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) 33
Regina v. *Riley*, 169 Eng. Rep. 674 (1853) 28
Regina v. *Thurborn*, 169 Eng. Rep. 293 (1848) 28
Rogers v. *United States*, 522 U.S. 252 (1998) 43
Russello v. *United States*, 464 U.S. 16 (1983) 17
Smith v. *United States*, 508 U.S. 223 (1993) 7, 35
Staples v. *United States*, 511 U.S. 600 (1994) 7, 34, 40, 41, 43
TRW Inc. v. *Andrews*, 534 U.S. 19 (2001) 14
United States v. *Atlantic Research Corp.*, 127 S. Ct. 2331 (2007) 13
United States v. *Bailey*, 444 U.S. 394 (1980) 43

Cases—Continued: Page

United States v. *Balint*, 258 U.S. 250 (1922) 40
United States v. *Bass*, 404 U.S. 336 (1971) 51
United States v. *Chin*, 981 F.2d 1275 (D.C. Cir. 1992), cert. denied, 508 U.S. 923 (1993) 25, 48
United States v. *Cook*, 76 F.3d 596 (4th Cir.), cert. denied, 519 U.S. 939 (1996) 34
United States v. *Cotton*, 535 U.S. 625 (2002) 47
United States v. *Cross*, 900 F.2d 66 (6th Cir. 1990) 47
United States v. *DeLuna*, 10 F.3d 1529 (10th Cir. 1993) 47
United States v. *Dimas*, 3 F.3d 1015 (7th Cir. 1993) ... 47
United States v. *Estrada-Sanchez*, 558 F. Supp. 2d 129 (D. Me. 2008) 15, 36
United States v. *Falu*, 776 F.2d 46 (2d Cir. 1985) 25, 47
United States v. *Feola*, 420 U.S. 671 (1975) 23, 41, 42
United States v. *Frazier*, 213 F.3d 409 (7th Cir.), cert. denied, 531 U.S. 1015 (2000) 48
United States v. *Freed*, 401 U.S. 601 (1971) 40, 41
United States v. *Godin*:
534 F.3d 51 (1st Cir. 2008) 10, 24, 31
489 F. Supp. 2d 118 (D. Me. 2007) rev'd, 534 F.3d 51 (1st Cir. 2008) 30
United States v. *Griffith*, 284 F.3d 338 (2d Cir.), cert. denied, 537 U.S. 986 (2002) 48
United States v. *Holland*, 810 F.2d 1215 (D.C. Cir.), cert. denied, 537 U.S. 986 (2002) 47
United States v. *Hurtado*, 508 F.3d 603 (11th Cir. 2007), cert. denied, 128 S. Ct. 2903 (2008) ... 16, 25, 31

Cases—Continued: Page

United States v. *International Minerals & Chem. Corp.*, 402 U.S. 558 (1971) 41
United States v. *Jackson*, 443 F.3d 293 (3d Cir. 2006) 47
United States v. *Jones*, 471 F.3d 535 (4th Cir. 2006) ... 12
United States v. *King*, 345 F.3d 149 (2d Cir. 2003), cert. denied, 540 U.S. 1167 (2004) 47
United States v. *Kozminski*, 487 U.S. 931 (1988) 51
United States v. *LaBonte*, 520 U.S. 751 (1997) 52
United States v. *Lewin*, 900 F.2d 145 (8th Cir. 1990) 47
United States v. *Mendoza-Gonzalez*, 520 F.3d 912 (8th Cir. 2008), petition for cert. pending, No. 08-5316 (filed July 15, 2008) 3
United States v. *Miranda-Lopez*, 532 F.3d 1034 (9th Cir. 2008) 14, 15, 16
United States v. *Montejo*:
442 F.3d 213 (4th Cir. 2006), cert. denied, 549 U.S. 879 (2006) 12, 18
353 F. Supp. 2d 643 (E.D. Va. 2005), aff'd, 442 F.3d 213 (4th Cir. 2006), cert. denied, 549 U.S. 879 (2006) 31
United States v. *Pitts*, 908 F.2d 458 (9th Cir. 1990) ... 47
United States v. *Ressam*, 128 S. Ct. 1858 (2008) ... 34, 50
United States v. *Shabani*, 513 U.S. 10 (1994) 17, 50
United States v. *Turley*, 352 U.S. 407 (1957) 28
United States v. *United States Gypsum Co.*, 438 U.S. 422 (1978) 39, 40

Cases—Continued: Page

United States v. *Villanueva-Sotelo*, 515 F.3d 1234 (D.C. Cir. 2008), petition for cert. pending, No. 08-622 (filed Nov. 7, 2008) ..... *passim*

United States v. *Wells*, 519 U.S. 482 (1997) 50

United States v. *Williams*, 128 S. Ct. 1830 (2008) .. 10, 11

United States v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994) ..... *passim*

United States v. *Yermain*, 468 U.S. 63 (1984) 45

Watson v. *United States*, 128 S. Ct. 579 (2007) 9

Statutes and guideline:

Dictionary Act, 1 U.S.C. 1 44

Emergency and Disaster Assistance Fraud Penalty Act of 2007, Pub. L. No. 110-179, § 2(a), 121 Stat. 2556 (to be codified at 28 U.S.C. 1040(a)(2) (Supp. II 2008)) 17

Identity Theft Penalty Enhancement Act of 2004, Pub. L. No. 108-275, § 2(a), 118 Stat. 831 13

Social Security Act, 42 U.S.C. 301 *et seq.* 33

7 U.S.C. 2024(b)(1) (1982) 18

8 U.S.C. 1325(a) 2

18 U.S.C. 371 17

18 U.S.C. 499 20

18 U.S.C. 641 (Supp. V 1951) 28

18 U.S.C. 641 2

18 U.S.C. 701 20

18 U.S.C. 922(q)(2)(A) 16

18 U.S.C. 1028(a) 20

Statutes and guideline—Continued: Page

18 U.S.C. 1028(d)(4) 13, 30
18 U.S.C. 1028(d)(7) 2, 27, 31
18 U.S.C. 1028A 5, 18, 31
18 U.S.C. 1028A(a)(1) ..... *passim*
18 U.S.C. 1028A(a)(2) ..... *passim*
18 U.S.C. 1028A(c) 2, 4, 7, 20
18 U.S.C. 1028A(c)(1) 2, 33
18 U.S.C. 1028A(c)(5) 2, 33
18 U.S.C. 1028A(c)(7) 2
18 U.S.C. 1028A(c)(11) 33
18 U.S.C. 1423 20
18 U.S.C. 1424 20
18 U.S.C. 1425(b) 20
18 U.S.C. 1426(b) 20
18 U.S.C. 1543 20
18 U.S.C. 1546(a) 2, 16, 17, 18, 20, 34, 35
18 U.S.C. 1546(b) 20
18 U.S.C. 2113(a) 29
18 U.S.C. 2252(a)(1) 10, 38
18 U.S.C. 2252(a)(2) 10, 38
18 U.S.C. 2252A(a)(3) 11
18 U.S.C. 2332b(g)(5)(B) 13
18 U.S.C. 2423(a) (2000) 48
21 U.S.C. 841(a) 46, 47
21 U.S.C. 841(a)(1) 46
21 U.S.C. 841(b)(1)(A) 47

Statutes and guideline—Continued: Page

21 U.S.C. 841(b)(1)(C) 47
21 U.S.C. 846 17
21 U.S.C. 860 47
21 U.S.C. 860(a) 46
21 U.S.C. 861(a) 47
21 U.S.C. 861(a)(1) 47, 48
26 U.S.C. 5861(d) 40
United States Sentencing Guidelines § 2B1.1(b)(1) ... 26

Miscellaneous:

Robert Funk et al., *The Elements of Grammar for Writers* (1991) 9
H.R. Rep. No. 528, 108th Cong, 2d Sess. (2004) 20, 21, 24, 26, 32
Oliver Wendell Holmes, Jr., *The Common Law* (1881) 28, 30, 31
Wayne R. LaFave, *Substantive Criminal Law* (2d ed. 2003):
Vol. 1 49
Vol. 2 ..... 48, 49
Vol. 3 ..... 29, 31
Model Penal Code § 2.02(4) (1985) 23, 43
Remarks on Signing the Identity Theft Penalty Enhancement Act, 28 Weekly Comp. Pres. Doc. 1305 (July 19, 2004) 22
2 William Oldnall Russell, *A Treatise on Crimes and Indictable Misdemeanors* (2d ed. 1828) 28

Miscellaneous—Continued: Page

Synovate, *Federal Trade Commission—Identity Theft Survey Report* (2003) 24
The Chicago Manual of Style (15th ed. 2003) 11, 12

In the Supreme Court of the United States

No. 08-108

IGNACIO CARLOS FLORES-FIGUEROA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the Federal Reporter but is available at 274 Fed. Appx. 501.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 2008. The petition for a writ of certiorari was filed on July 22, 2008, and was granted on October 20, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-8a.

STATEMENT

Petitioner pleaded guilty to two counts of misuse of immigration documents, in violation of 18 U.S.C. 1546(a), and one count of entering the United States without inspection, in violation of 8 U.S.C. 1325(a). Following a bench trial, petitioner was also convicted of two counts of aggravated identity theft, in violation of 18 U.S.C. 1028A(a)(1). He was sentenced to 75 months of imprisonment, to be followed by three years of supervised release. Pet. App. 2a, 6a, 8a. The court of appeals affirmed. *Id.* at 1a-3a.

1. Section 1028A(a)(1) prescribes a two-year term of imprisonment for any person who

> during and in relation to any felony violation enumerated in [18 U.S.C. 1028A(c)], knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person.

18 U.S.C. 1028A(a)(1); see 18 U.S.C. 1028(d)(7) (defining "means of identification" as "any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual" and listing examples). Section 1028A(c) enumerates a variety of predicate offenses, including violations of 18 U.S.C. 641 (theft of federal property), "any provision contained in chapter 63 (relating to mail, bank or wire fraud)," and "any provision contained in chapter 75 (relating to passports and visas)." 18 U.S.C. 1028A(c)(1), (5) and (7).

2. Petitioner is a citizen of Mexico. In 2000, petitioner began working for a steel company under an assumed name. At that time, petitioner gave a false date of birth and a social security number that had never been assigned to a real person. He also presented a counterfeit alien registration card, but the record con-

tains no evidence that the number on that card had been assigned to a real person. 5/10/07 Tr. 10-11, 28, 33; Presentencing Report para. 4 (PSR).[1]

In 2006, petitioner told his employer that he wanted to be known by his true name and to change the social security and alien registration numbers on file for him. In connection with that request, petitioner presented counterfeit social security and alien registration cards that contained numbers that had, in fact, been assigned to other people. His employer was suspicious and contacted federal authorities. Petitioner was in posession of the counterfeit documents when he was arrested. Pet. App. 2a; 5/10/07 Tr. 10-11, 13-18, 27; PSR para. 4.

3. Petitioner was charged with one count of entering the United States without inspection, two counts of misuse of immigration documents, and two counts of aggravated identity theft. Indictment 1-3. At a bench trial on the aggravated-identity-theft counts, petitioner moved for a judgment of acquittal on the ground that the government had not established that he knew that the numbers on the counterfeit documents had been assigned to other people. Pet. App. 2a; 5/10/07 Tr. 30. The district court denied that motion and found petitioner guilty on both counts. *Id.* at 32, 50.

4. The court of appeals affirmed. Pet. App. 1a-3a. The court stated that its decision in *United States* v. *Mendoza-Gonzalez*, 520 F.3d 912 (8th Cir. 2008), petition for cert. pending, No. 08-5316 (filed July 15, 2008), had "resolved th[e] issue" raised by petitioner. Pet. App. 3a.

[1] Because Section 1028A(a)(1) applies only when the means of identification was that "of another person," petitioner's conduct in 2000 would not have subjected him to liability under that statute, even had it been in effect at that time.

SUMMARY OF ARGUMENT

The court of appeals correctly held that 18 U.S.C. 1028A(a)(1) does not require the government to prove that the defendant knew that the means of identification in question was that "of another person."

A. Section 1028A(a)(1) prescribes a two-year term of imprisonment for any person who, "during and in relation to any felony violation enumerated in [Section 1028A(c)], knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." 18 U.S.C. 1028A(a)(1). Petitioner's carefully chosen examples notwithstanding, the most natural grammatical reading of the provision Congress enacted is that the adverb "knowingly" applies only to the verbs that immediately follow it: "transfers, possesses, or uses." There is no structural barrier to interpreting Section 1028A(a)(1) in that manner; to the contrary, the presence of a comma after the final verb ("uses"), and Congress's insertion of the clause "without lawful authority," further undermines petitioner's contention that the effect of the word "knowingly" extends all the way to "of another person."

Statutory context likewise indicates that Section 1028A(a)(1)'s "knowingly" requirement does not reach the words "of another person." If that were the case, the same would have to be true in the almost identically worded Subsection (a)(2). But any such interpretation would create a serious surplusage problem with respect to Subsection (a)(2). In contrast, there would be no comparable surplusage problem even if the Court were to conclude that the "knowingly" requirement also applies to the words "without lawful authority" or "means of identification."

B. The overriding purpose of Section 1028A(a)(1) supports interpreting it to impose liability without requiring proof that the defendant knew that he used a means of identification of an actual victim. The statute's purpose is to provide enhanced protection for individuals whose identifying information is used to facilitate the commission of crimes. The harm a victim suffers when her identity is so misused bears no necessary relationship to the perpetrator's awareness of her existence. The court of appeals' interpretation appropriately places on the wrongdoer the burden of inquiry and the risk of misjudgment about the presence of a real victim.

Petitioner and his amici focus heavily on the words "theft" and "thieves" in Section 1028A's title and legislative history. But Section 1028A(a)(1) is a victim-focused statute, and it is perfectly natural to refer to a person whose identifying information is used to facilitate the commission of another crime as having been a victim of identity theft. Petitioner has also failed to demonstrate that "theft" had any settled common-law meaning. In any event, that term appears nowhere in the operative statutory text, and consideration of both the statutory text and legislative history makes clear that the offense created by 18 U.S.C. 1028A departs from common-law larceny in a number of other respects.

C. Section 1028A(a)(1) will not criminalize any apparently innocent conduct regardless of how the Court resolves the question before it. Section 1028A(a)(1) is not even potentially applicable unless the means of identification is used "during" the commission of an enumerated felony. The statute's "in relation to" requirement further ensures that a defendant does not violate Section 1028A(a)(1) unless his transfer, possession, or use of something that is, in fact, a means of identification of

another person facilitates or has the potential of facilitating the predicate felony. And any lingering concerns about criminalizing unwitting or apparently innocent conduct would be fully addressed if Section 1028A(a)(1)'s "knowingly" requirement were construed as applicable to the "without lawful authority" and "means of identification" requirements.

D. No legal presumption exists that a defendant must be aware of all of the facts necessary to make his conduct unlawful or trigger enhanced punishment. "The presumption in favor of scienter" recognized in this Court's cases "requires a court to read into a statute *only* that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter* v. *United States*, 530 U.S. 255, 269 (2000) (emphasis added; citation omitted). Congress has not directed federal courts to presume that any statutorily prescribed *mens rea* requirement applies to all elements of a criminal offense, nor did Congress have any reason to believe that this Court would apply such a presumption when it enacted Section 1028A(a)(1).

E. The rule of lenity is inapplicable here because there is no grievous ambiguity that would justify resort to the rule. In addition, Congress's decision to prescribe a specific punishment for a violation of Section 1028A(a)(1) is entitled to no special weight in the rule-of-lenity analysis.

ARGUMENT

SECTION 1028A(a)(1) DOES NOT REQUIRE THE GOVERNMENT TO PROVE THAT THE DEFENDANT KNEW THAT THE MEANS OF IDENTIFICATION IN QUESTION WAS THAT "OF ANOTHER PERSON"

The question presented is whether 18 U.S.C. 1028A(a)(1) requires the government to prove that the defendant knew that the particular means of identification in question was that "of another person." The answer is no.

This Court has cautioned against construing statutes as "criminaliz[ing] a broad range of apparently innocent conduct," *Liparota* v. *United States*, 471 U.S. 419, 426 (1985), or authorizing convictions where the defendant has "knowledge only of traditionally lawful conduct," *Staples* v. *United States*, 511 U.S. 600, 618 (1994). No such risk exists under Section 1028A(a)(1), which applies only when a person commits a qualifying predicate felony. In addition, Section 1028A(a)(1)'s "in relation to" requirement ensures that a defendant does not violate the statute unless his unlawful transfer, possession, or use of a means of identification that is, in fact, that of other person "facilitat[es] or ha[s] the potential of facilitating" the predicate felony. *Smith* v. *United States*, 508 U.S. 223, 238 (1993) (citation omitted). Even if some conceivable concerns about criminalizing unwitting or innocent conduct were to remain, they would be fully addressed if Section 1028A(a)(1)'s "knowingly" requirement were construed as applicable to the "without lawful authority" and "means of identification" requirements. And because "[t]he presumption in favor of scienter requires a court to read into a statute *only* that *mens rea* which is necessary to separate wrongful conduct from

'otherwise innocent conduct,'" *Carter*, 530 U.S. at 269 (emphasis added; citation omitted), it provides no basis for construing Section 1028A(a)(1)'s "knowingly" requirement as extending all the way to the words "of another person."

Because Section 1028A(a)(1) will pose no trap for the innocent or unwary regardless of the Court's resolution of this case, the statute should be construed in a straightforward manner in light of its text and apparent purpose. Considered as a whole, the statutory text is most naturally read as prohibiting the transfer, possession, or use of a means of identification "of another person," without requiring the government to show that the defendant knew of that other person. That reading is confirmed by Congress's overriding aim of providing enhanced protections for real-world victims whose identifying information is used to commit other crimes, and by the lack of any necessary connection between the harms those victims suffer and the government's ability to prove a particular defendant's subjective awareness of their existence.

A. The Statutory Text And Context Indicate That Section 1028A(a)(1) Does Not Require Proof That The Defendant Knew That The Means Of Identification In Question Was That Of Another Person

1. Section 1028A(a)(1) mandates a two-year term of imprisonment for any person who, "during and in relation to any felony violation enumerated in [Section 1028A(c)], knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." 18 U.S.C. 1028A(a)(1). The most natural grammatical reading of this provision is that the "knowingly" requirement applies only to the *nature* of the defen-

dant's conduct that is, a "transfer[], possess[ion], or use[]" of an item that is, in fact, a means of identification of another person.

Petitioner invokes "common usage" purportedly to show that an adverb like "knowingly" is ordinarily taken "to apply not only to adjacent verbs, but also to any direct object that may follow." Pet. Br. 9. The examples he gives, however, load the dice on that point; they do not prove the general proposition for which they are offered.

For example, petitioner offers the statements "John knowingly discarded his sister's homework," and "John knowingly ate the last slice of pizza." Pet. Br. 9. The first example's use of the possessive ("sister's") suggests that John *knew* that the item he discarded belonged to his sister. A formulation that put the modifier afterwards—*i.e.*, "John knowingly discarded the homework of his sister"—does not necessarily convey that implication. The second example's meaning is overtaken by the reader's assumption that one normally knows what he is eating, which raises the inference that "knowingly" must refer to something else.

In the end, supposed common usage (based on a handful of carefully selected examples) cannot generate rules of construction that supplant grammar. The word "knowingly" is an adverb, and "[a]n adverb, in standard English, modifies almost anything *except* a noun," Robert Funk et al., *The Elements of Grammar for Writers* 62 (1991), including the noun phrase "a means of identification of another person." That is a basic feature of "the language as we normally speak it." *Watson* v. *United States*, 128 S. Ct. 579, 583 (2007). Even courts of appeals that have ultimately adopted petitioner's proposed interpretation have acknowledged that "[i]n a

purely grammatical sense, 'knowingly,' as an adverb, modifies only the verbs 'transfers, possesses, or uses.'" *United States* v. *Godin*, 534 F.3d 51, 56 (1st Cir. 2008); accord *United States* v. *Villanueva-Sotelo*, 515 F.3d 1234, 1238 (D.C. Cir. 2008), petition for cert. pending, No. 08-622 (filed Nov. 7, 2008).

This Court has made the same grammatical point in other contexts. In *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994), for example, the Court considered a statute that referred, in pertinent part, to a person who "knowingly transports or ships in interstate commerce by any means including by computer or mails, any visual depiction, if" certain other requirements were met. *Id.* at 68 (quoting 18 U.S.C. 2252(a)(1) and (2)). The Court stated that "[t]he most natural grammatical reading" of that statute "suggest[ed] that the term 'knowingly' modifie[d] *only* the surrounding verbs: transports, ships, receives, distributes, or reproduces." *Ibid.* (emphasis added). Thus, as a matter of grammar, the word "knowingly" would not have applied to the words "any visual depiction," whose placement in the statute at issue in *X-Citement Video* parallels the placement of the words "a means of identification of another person" in Section 1028A(a)(1).[2]

In *United States* v. *Williams*, 128 S. Ct. 1830 (2008), in contrast, the Court considered a statute where struc-

[2] In *X-Citement Video*, the Court ultimately concluded that the statute's "knowingly" requirement extended to two other requirements set forth later in the statute. 513 U.S. at 78. In reaching that conclusion, the Court cited "anomalies which [would] result from [a contrary] construction," the presumption of scienter, and the constitutional-avoidance canon. *Id.* at 68-69. No similar reasons justify departing from "[t]he most natural grammatical reading" of the statutory text (*id.* at 68) in this case. See pp. 33-52, *infra*.

tural clues indicated that the word "knowingly" modified an entire statutory section. That case involved a statute where the solitary word "knowingly" was set off by a dash from and "introduce[d]" two distinct subsections. *Id.* at 1839; see 18 U.S.C. 2252A(a)(3). The Court determined that the statute's structure made clear that the word knowingly "applie[d] to" the two subsections "in [their] entirety," and it stated that "there [was] no grammatical barrier to reading [the statute] in that way." *Williams*, 128 S. Ct. at 1839. Indeed, because the single word "knowingly" clearly extended through the dash and past an "(A)," because that same introductory adverb clearly applied to the verbs immediately following the "(B)" as well, and because the verbs in both subsections were not set off in any way from the words that followed them, there would have been a structural barrier in *Williams* to construing the "knowingly" requirement as applying *only* to the verbs that began each subsection. See 18 U.S.C. 2252A(a)(3).

There are no structural barriers to giving Section 1028A(a)(1) its "most natural grammatical reading." *X-Citement Video*, 513 U.S. at 68. In Section 1028A(a)(1), "knowingly" immediately precedes the only verbs that it could plausibly modify, and there are no intervening punctuation marks or other words that separate "knowingly" from those verbs.

Nor is there any other textual reason to believe that the effect of the word "knowingly" in Section 1028A(a)(1) extends past the three verbs that immediately follow it. An "adverb should generally be placed as near as possible to the word it is intended to modify," *The Chicago Manual of Style* ¶ 5.155, at 185 (15th ed. 2003) (*Chicago Manual*), and "common usage" indicates that the word "knowingly" in Section 1028A(a)(1) "does

not modify the entirely lengthy predicate that follows it." *United States* v. *Montejo*, 442 F.3d 213, 215 (4th Cir.), cert. denied, 549 U.S. 879 (2006). "Adverbs generally modify verbs, and the thought that they would typically modify the infinite hereafters of statutory sentences would cause grammarians to recoil." *United States* v. *Jones*, 471 F.3d 535, 539 (4th Cir. 2006).

To the contrary, there is a structural barrier to construing Section 1028A(a)(1)'s "knowingly" requirement as extending all the way to the words "of another person." Although petitioner omits it when paraphrasing the statute (see Pet. Br. 9), Section 1028A(a)(1) contains a clause that is set off by commas after the final verb that follows "knowingly" and before the words "a means of identification of another person." See 18 U.S.C. 1028A(a)(1) ("knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person"). A comma directs a reader to make "a slight pause," *Chicago Manual* ¶ 6.18, at 244, which further reinforces the inference that the effect of the adverb "knowingly" does not extend past the verbs that follow it, much less past the entire additional element "without lawful authority," which ends with another comma.

2. Interpreting Section 1028A(a)(1)'s "knowingly" requirement as applying to the words "of another person" would also create a serious surplusage problem with respect to the almost identically worded Section 1028A(a)(2). In contrast, there would be no comparable surplusage problem even if the Court were to conclude that the effect of "knowingly" extends past the verbs that follow it and reaches the words "without lawful authority" or "a means of identification."

a. Like Subsection (a)(1), the provision at issue here, Subsection (a)(2) was enacted as part of the Identity Theft Penalty Enhancement Act, Pub. L. No. 108-275, § 2(a), 118 Stat. 831. The two provisions are worded almost identically: in fact, there are only three differences between them. First, the predicate offenses specified by Subsection (a)(2) are all terrorism-related. 18 U.S.C. 1028A(a)(2) (incorporating list in 18 U.S.C. 2332b(g)(5)(B)). Second, Subsection (a)(2) prescribes a five-year term of imprisonment rather than Subsection (a)(1)'s two-year term of imprisonment. 18 U.S.C. 1028A(a)(1) and (2).

The third difference between Subsections (a)(1) and (a)(2) is the critical one here. Section 1028A(a)(1) applies to one who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." 18 U.S.C. 1028A(a)(1). Section 1028A(a)(2), in contrast, adds the words "or a false identification document," so that the provision applies to one who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person or a false identification document." 18 U.S.C. 1028A(a)(2); see 18 U.S.C. 1028(d)(4) (definition of "false identification document").

b. Petitioner's argument is that Subsection (a)(1)'s "knowingly" requirement extends to the words "of another person" in that provision. If that were correct, the same conclusion would apply to Subsection (a)(2), because the critical language of the two provisions is identical up to that point. *United States* v. *Atlantic Research Corp.*, 127 S. Ct. 2331, 2336 (2007) (stating that the need to read a statute "as a whole" has particular force where the provisions in question "are adjacent" and have "similar structures").

In addition, the words "transfers, possesses, or uses" are the only verbs in Subsection (a)(2), and Subsection (a)(2) contains no punctuation marks between "of another person" and "or a false identification document." 18 U.S.C. 1028A(a)(2). As a result, a conclusion that the effect of the adverb "knowingly" in Subsection (a)(2) extends beyond the three verbs that immediately follow it and also reaches the first object of those verbs (that is, "a means of identification of another person") would require the same conclusion with respect to the second object as well (that is, "a false identification document").

The problem with such an interpretation, however, is that it would render superfluous the words "of another person" in Subsection (a)(2). See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotation marks and citation omitted). It would be "at the least unnecessary, and perhaps absurd" to interpret Section 1028A(a)(2) as if it applied to one who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification *knowing that it belongs to* another person or is a false identification document." *United States* v. *Miranda-Lopez*, 532 F.3d 1034, 1042 (9th Cir. 2008) (Bybee, J., concurring in part and dissenting in part). "A person who knowingly transfers a means of identification without lawful authority must necessarily know that the identification *either* belongs to another person *or* that it is false; there are no other choices." *Ibid.* (Bybee, J., concurring in part and dissenting in part) (emphases added).[3] The

[3] Judge Bybee implicitly assumed that Section 1028A(a)(1)'s "knowingly" requirement applies through the words "without lawful author-

fact that a "second 'knowingly' requirement * * * cannot peaceably be read into" Subsection (a)(2) cuts against reading one into "the nearly identical" Subsection (a)(1). *Id.* at 1043 (Bybee, J., concurring in part and dissenting in part).[4]

In contrast, there would be no superfluous language at all if the Court were to give Subsections (a)(1) and (a)(2) their "most natural grammatical reading," *X-Citement Video*, 513 U.S. at 68, and hold that, in both subsections, the adverb "knowingly" applies only to the verbs that immediately follow it. The same would be true for both provisions if the Court were to conclude that the effect of "knowingly" terminates with the comma following the words "without lawful authority."

Even if Subsection (a)(2)'s "knowingly" requirement were understood to apply to "a means of identification," the words "of another person" in that provision would still not be "mere surplusage." *BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 98 (2006). Although it could be argued that such a construction would render unnecessary

ity." In addition to eliminating the surplusage problem, such a construction would also further reduce any potential concerns about criminalizing unwitting or apparently innocent conduct. See pp. 33-36, *infra*.

[4] In *Villanueva-Sotelo*, the D.C. Circuit stated that the government had "concede[d]" at oral argument that Subsection (a)(2)'s "knowledge requirement must apply to the whole phrase 'false identification document.'" 515 F.3d at 1239 (citation omitted). Petitioner does not assert that the government made any such concession in this case, and it does not so concede here. Accord *Miranda-Lopez*, 532 F.3d at 1043 (Bybee, J., concurring in part and dissenting in part); *United States* v. *Estrada-Sanchez*, 558 F. Supp. 2d 129, 136 n.7 (D. Me. 2008). Petitioner likewise makes no attempt to respond to the argument that such a reading would render superfluous the words "of another person" in Section 1028A(a)(2).

"[t]he *entire phrase* 'of another person or a false identification document,'" the separate listing of "a means of identification *or* a false identification document" in Subsection (a)(2) could plausibly be understood to underscore the difference between Subsections (a)(1) and (a)(2), the former of "which applies *only* to the use of another's identification." *Miranda-Lopez*, 532 F.3d at 1039, 1040 n.5.

3. a. For the reasons explained above, the most natural reading of Section 1028A(a)(1) is that a defendant need not know that the particular means of identification in question was that "of another person." "If Congress had wished to extend the knowledge requirement [in Section 1028A(a)(1)] to other portions of this subsection, it could have drafted the statute to prohibit the knowing transfer, possession, or use, without lawful authority, of the means of identification 'known to belong to another actual person.'" *United States* v. *Hurtado*, 508 F.3d 603, 609 (11th Cir. 2007) (per curiam), cert. denied, 128 S. Ct. 2903 (2008).

b. This point is underscored by 18 U.S.C. 1546(a), the provision whose violation formed the predicate for petitioner's convictions under Section 1028A(a)(1). In Section 1546(a), Congress made it unlawful to "*knowingly* * * * use[] * * * [any] document prescribed by statute or regulation for entry into or evidence of authorized stay or employment in the United States, *knowing* it to be forged, counterfeited, altered, or falsely made." 18 U.S.C. 1546(a) (emphases added). Cf. 18 U.S.C. 922(q)(2)(A) (making it unlawful "for any individual *knowingly* to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual *knows, or has reasonable cause to believe*, is a school zone") (emphases added);

Emergency and Disaster Assistance Fraud Penalty Act of 2007, Pub. L. No. 110-179, § 2(a), 121 Stat. 2556 (to be codified at 18 U.S.C. 1040(a)(2) (Supp. II 2008)) (making it unlawful to "*knowingly* * * * make[] any materially false, fictitious, or fraudulent statement or representation, or make[] or use[] any false writing or document *knowing* the same to contain any materially false, fictitious, or fraudulent statement or representation") (emphases added).

This Court has stated that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted). Although "[t]he *Russello* presumption * * * grows weaker with each difference in the formulation of the provisions under inspection," *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 435-436 (2002), the Court has applied a similar analysis when a relevant comparison of different statutes suggests that the presence of certain language in one indicates that its absence in another reflects a deliberate congressional choice. In *United States* v. *Shabani*, 513 U.S. 10 (1994), for example, the Court unanimously rejected the argument that courts should read into the drug conspiracy statute, 21 U.S.C. 846, a requirement that a conspirator have committed an overt act. In so holding, the Court cited the fact that, unlike the general conspiracy statute, 18 U.S.C. 371, the text of Section 846 does not contain an overt-act requirement. *Shabani*, 513 U.S. at 14.

The same general point applies here. Like Section 1028A, Section 1546(a) governs unlawful use of identity documents. And in the latter provision, but not the for-

mer, Congress has expressly provided that the defendant must have knowledge not only of the nature of his conduct (for example, "use" of an item) but also the nature of the item in question. That contrast between Section 1028A(a)(1) and Section 1546(a) "speaks volumes." *Shabani*, 513 U.S. at 14.[5]

4. Petitioner errs in asserting (Pet. Br. 27-28) that this Court's decision in *Liparota* establishes the sweeping proposition that all "statutes with knowledge requirements" are "inherently ambiguous." To the contrary, "*Liparota*'s discussion of the scope of 'knowingly' should not be understood apart from the Court's primary stated concern [of] avoiding criminalization of otherwise non-culpable conduct." *Montejo*, 442 F.3d at 216. As explained below, there is no such danger here. See pp. 33-36, *infra*.

The statute at issue in *Liparota* was also structurally different from the one at issue in this case. Unlike Section 1028A(a)(1), see p. 12, *supra*, the statute at issue in *Liparota* did not contain an intervening clause after the verbs that immediately followed the word "knowingly." See 471 U.S. at 420 n.1 (quoting 7 U.S.C. 2024(b)(1) (1982), which provided, in pertinent part, "whoever knowingly uses, transfers, acquires, alters, or possesses

[5] In *Liparota*, the Court concluded that Congress's different placement of the word "knowingly" in adjacent statutory provisions was "too slender a reed" to support a conclusion that the "knowingly" requirement in the former applied only to the verbs that immediately followed it. 471 U.S. at 429. But the basis for this conclusion was that acceptance of the government's argument "would lead to the demise of the very distinction that Congress is said to have desired" because it would have meant that any person who violated the latter statute would also, *a fortiori*, have violated the former. *Ibid.* No such anomaly exists here because there is no violation of Section 1028A(a)(1) unless the means of identification in question is that "of another person."

coupons or authorization cards in any manner not authorized by this chapter or the regulations issued pursuant to this chapter shall" be guilty of a crime). Nor did the Court's holding in *Liparota* create a serious superfluity problem with respect to a closely related, and nearly identically worded, provision. See pp. 12-16, *supra*. For those reasons as well, *Liparota*'s extremely brief discussion of the statutory text at issue in that case, see 471 U.S. at 424, and its block quotation in a footnote of a passage from a treatise that the Court stated "aptly summed up the ambiguity in an analogous situation," *id.* at 424 n.7, cannot bear the heavy weight petitioner seeks to place upon it.

B. Statutory Purpose Counsels Against Requiring The Government To Prove That The Defendant Knew That The Means Of Identification Was That "Of Another Person"

The unmistakable purpose of Section 1028A(a)(1) is to provide enhanced protections for victims. Extending the statute's "knowingly" requirement to the words "of another person" would frustrate that purpose. The harm a victim suffers when her identifying information is used to facilitate the commission of another crime does not depend on whether the wrongdoer was consciously aware that she existed. The courts that have adopted petitioner's proposed construction have erred in focusing on whether someone like petitioner would have been labeled a "thief" at common law. Instead, the appropriate inquiry is whether a person whose means of identification is used in a way proscribed by Section 1028A(a)(1) has suffered the sort of harm Congress meant to address. The answer is clearly yes.

1. The purpose of Section 1028A(a)(1) is to provide enhanced protections for victims

The statutory text makes clear that the *sine qua non* of a Section 1028A(a)(1) offense is the presence of a real victim. Congress has enacted other statutes that make it unlawful to create, transfer, or use forged or otherwise falsified identification documents that do not depend on whether the document itself or a means of identification contained therein belongs to or is that of an actual person. See, *e.g.*, 18 U.S.C. 499, 701, 1028(a), 1423, 1424, 1425(b), 1426(b), 1543, 1546(a), 1546(b). Like those statutes, Section 1028A(a)(1) requires that the defendant's knowing transfer, possession, or use of the means of identification must itself be improper (that is, "without lawful authority") and must serve a particular function (that is, be "in relation to" one of the felonies specified in Subsection (c)). 18 U.S.C. 1028A(a)(1). Unlike those statutes, however, Section 1028A(a)(1) also requires that the means of identification in question must, in fact, be that "of another person." *Ibid.*

Section 1028A(a)(1)'s legislative history underscores Congress's emphasis on the victim. The first sentence under the heading "Background and Need for the Legislation" in the House Judiciary Committee's report on the bill that enacted Section 1028A(a)(1) states that "[t]he terms 'identity theft' and 'identity fraud' refer to *all* types of crimes in which someone wrongfully obtains and uses *another person's personal data* in some way that involves fraud or deception." H.R. Rep. No. 528, 108th Cong., 2d Sess. 4 (2004) (*House Report*) (emphases added).[6]

[6] Because the *House Report*'s definition expressly equates "identity theft" and "identity fraud," it is fatal to the repeated claims by peti-

The statistics recounted in the *House Report* about the prevalence of "types of identity theft" (*House Report* 4) also focus on the harms suffered by those whose identities are misappropriated, and they draw no distinction based on whether the perpetrators knew their victims existed. The *House Report* states that "[t]he Federal Trade Commission ('FTC') received 161,819 victim complaints of someone *using another's information* in 2002" and that a 2003 study found that "[a] total of 4.6% of survey participants indicated that they had discovered that they were victims of *some* type of identity theft in the past year." *Ibid.* (emphases added). The *House Report* further explains that "[t]he FTC estimates the loss to businesses and financial institutions from identity theft to be $47.6 billion" and "[t]he costs to individual consumers * * * to be approximately $5.0 billion." *Ibid.*

Member statements in the *House Report* likewise underscore that Section 1028A(a)(1)'s overriding purpose is, in the words of one of its sponsors, "protect[ing] the good credit and reputation of hardworking Americans." *House Report* 51 (statement of Rep. Schiff). Members emphasized that "victims [of identity theft] have a difficult [and] time consuming * * * task of repairing a damaged credit history." *Id.* at 25 (statement

tioner and his amici (see, *e.g.*, Pet. Br. 8, 21; EPIC Amicus Br. 8-19) that Congress perceived any fundamental distinction between the two. See pp. 27-33, *infra* (identifying other reasons why use of the term "theft" in the statutory title and legislative history do not warrant a different result). Nor do the words "wrongfully obtains" in the definition quoted above aid petitioner. There is a right way to obtain a social security or other identifying number; making up a string of numbers, or using numbers purchased from someone else, is not it.

of Rep. Coble). In particular, they noted that "[a] victim of identity theft usually spends a year and a half working to restore his or her identity and good name," *id.* at 50 (statement of Rep. Schiff); accord *id.* at 44 (statement of Rep. Jackson Lee) ("an average of 600 hours"), and that "[b]eing a victim costs an average of $1,400 in out-of-pocket expenses," *ibid.* (statement of Rep. Jackson Lee). One of Section 1028A(a)(1)'s sponsors also stated that previous sentencing practices had failed to "reflect the impact on the victims." *Id.* at 51 (statement of Rep. Schiff); accord *Remarks on Signing the Identity Theft Penalty Enhancement Act*, 40 Weekly Comp. Pres. Doc. 1305, 1306 (July 19, 2004) (stating that current "sentences for these crimes do not reflect the damage done to the victim").[7]

2. Requiring the government to prove that the defendant was aware of the victim's existence would undermine the statutory purpose

As just explained, Section 1028A(a)(1) is a victim-focused statute whose overriding purpose is to provide enhanced protection for those whose personal identifying information is used to facilitate the commission of another crime. Requiring the government to demonstrate that a defendant was specifically aware that the

[7] It is true (Pet. Br. 20) that the *House Report* describes the bill as "address[ing] the most serious criminals," but the remainder of that sentence which petitioner fails to quote makes clear that the *Report*'s authors viewed that class as consisting of those who commit identity crimes "in furtherance of other more serious crimes." *House Report* 9; see *ibid.* (stating that the bill "is intended to reduce the incidence of identity theft and fraud and address the most serious criminals by providing stronger penalties for those who would commit such crimes in furtherance of other more serious crimes").

particular means of identification in question was that "of another person" would undermine that purpose.

a. In *United States* v. *Feola*, 420 U.S. 671 (1975), this Court held that a statute that made it unlawful to forcibly assault a federal officer required only that the government demonstrate "an intent to assault, not an intent to assault a federal officer." *Id.* at 684. The Court explained that at least one of the statute's purposes was to "accord[] maximum protection to federal officers," and it determined that a contrary construction would offer no protection "to the agent acting under cover." *Ibid.* As a result, the Court concluded that Congress's purpose "could well be frustrated by the imposition of a strict scienter requirement." *Id.* at 678.[8]

The same is true here. The degree of harm suffered by a victim whose identifying information has been used in a way that facilitates the commission of another crime does not vary depending on how the perpetrator acquired that information or whether he has a specific awareness that a tangible victim exists. For example, "the effect on a victim's credit rating is the same whether someone (1) makes up a social security number, procures credit with that number, and does not repay or (2) steals a social security number from a database, procures credit with that number, and does not repay."

[8] The only mention of *Feola* in petitioner's brief is in a footnote that briefly asserts that the case involved a "'jurisdictional' elements" exception to a "presumption" that any *mens rea* requirement set forth in the text of a criminal statute applies to all facts that make the defendant's conduct unlawful. Pet. Br. 18 & n.4. No such presumption exists. See pp. 39-49, *infra*. Even if it did, moreover, petitioner acknowledges that it would have to yield where "a contrary purpose plainly appears," Pet. Br. 19 (quoting Model Penal Code § 2.02(4) (1985)), and the Court's analysis in *Feola* demonstrates why this would be such a case.

Godin, 534 F.3d at 59. Petitioner's proposed construction, however, would mean that Section 1028A(a)(1) would provide no protection at all in the former situation, notwithstanding the presence of the sort of real victim for whom Congress intended to provide enhanced protection.

Petitioner may be correct (Pet. Br. 31) that a victim is particularly likely to suffer tangible financial harm where the perpetrator misuses a means of identification in order to gain access to already existing accounts. But the same document upon which petitioner relies states that, "[a]mong Identity Theft victims, 17% said the thief used the victim's personal information to *open* at least one new account," Synovate, *Federal Trade Commission— Identity Theft Survey Report* 34 (2003) (emphasis added), and a perpetrator need not know that a victim exists in order to do so. In addition, regardless of whether a particular victim suffers tangible economic harm, a defendant does not violate Section 1028A(a)(1) unless he misappropriates a means of identification "of another person" in a manner that facilitates his commission of *another* crime. And having one's identifying information used in connection with criminal activity poses an obvious risk of harm to the victim. See *House Report* 25 (statement of Rep. Coble) ("Identity theft and identity fraud are terms used to refer to all types of crimes in which an individual's personal or financial data is misused, typically for economic gain *or* to facilitate another criminal activity.") (emphasis added).

b. Petitioner also ignores the perverse incentives that his proposed construction would create. A holding that petitioner was entitled to a judgment of acquittal on the Section 1028A(a)(1) counts would "allow a defendant to use the identification of another person fraudulently

in the commission of an enumerated felony so long as the defendant remains ignorant of whether that other person is real." *Hurtado*, 508 F.3d at 609. Such a rule could encourage wrongdoers to take steps to avoid learning whether a particular means of identification was that "of another person," and to argue when caught that they were unaware of that fact. It is true (Pet. Br. 33) that the manner in which the defendant obtained or used a particular means of identification may, in some cases, provide strong circumstantial evidence that he knew that it was, in fact, that "of another person." But that does not change the reality that requiring the government to establish such knowledge beyond a reasonable doubt would in a class of cases impose an "impossible burden." *Villanueva-Sotelo*, 515 F.3d at 1255 (Henderson, J., dissenting) (citation omitted).

In contrast, the construction adopted by the court of appeals would require those who commit one of the specified predicate crimes to "bear the burden of ascertaining" whether a means of identification they use to facilitate the commission of that crime is that of another person by subjecting them to "enhanced penalties" if that is the case. *United States* v. *Falu*, 776 F.2d 46, 50 (2d Cir. 1985). "[I]mpos[ing] on the [wrongdoer] the burden of inquiry and the risk of misjudgment," *United States* v. *Chin*, 981 F.2d 1275, 1280 (D.C. Cir. 1992) (R.B. Ginsburg, J.), cert. denied, 508 U.S. 923 (1993), is far more consistent with Congress's aim of providing enhanced protection for victims than the construction advocated by petitioner.

c. Petitioner errs in asserting (Pet. Br. 22) that, "under the court of appeals' interpretation, the law draws *no* distinction between defendants with significantly *different* levels of culpability." A defendant "who

intentionally steals thousands of credit card numbers and bilks their owners out of hundreds of thousands of dollars" (*ibid.*) will commit as many Section 1028A(a)(1) violations as people he bilks. In addition, the hypothetical defendant posited by petitioner would also be subject to punishment for the underlying predicate crimes, and his infliction of six digits worth of financial harm would probably be taken into account in imposing sentence. Cf. Sentencing Guidelines § 2B1.1(b)(1).

Petitioner also asserts (Pet. Br. 23 n.9) that, under his proposed construction, the fact that a defendant unknowingly used the means of identification of another person "presumably can be taken into account in setting the punishment for the identity fraud." The history recounted above, however, shows that one of the motivating factors for Section 1028A(a)(1) was the belief that precisely that sort of discretionary sentencing regime had failed to "reflect the impact on the victims." *House Report* 51 (statement of Rep. Schiff). Cf. Advocates for Human Rights (AHR) Amicus Br. 19-20 (asserting that a first offense under 18 U.S.C. 1546(a), the crime that formed the predicate for petitioner's convictions under Section 1028A(a)(1), would generally result in an advisory Guidelines range of 0 to 6 months of imprisonment); MALDEF Amicus Br. 11-12 (same). It is Congress that "has primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme," and courts "do not sit as a 'superlegislature' to second-guess these policy choices." *Ewing* v. *California*, 538 U.S. 11, 28 (2003) (plurality opinion); see *Gore* v. *United States*, 357 U.S. 386, 393 (1958) ("Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility,

these are peculiarly questions of legislative policy.") (citation omitted).

3. Neither the statute's title nor the references to "theft" and "thieves" in the legislative history warrants a different conclusion

Petitioner and his amici rely heavily on the existence of the word "theft" in both the statutory short title and in Section 1028A's heading and on the numerous references to "thieves" and "theft" in the legislative history. In essence, petitioner's argument is that "the traditional understanding of theft" (Pet. Br. 13) required "knowledge that the property misappropriated in fact belongs to another" (*id.* at 15), and that Section 1028A(a)(1) should be interpreted to preserve "this defining aspect of the traditional understanding of theft. *Id.* at 16; see *Villanueva-Sotelo*, 515 F.3d at 1243-1246.[9] That argument lacks merit.

a. This Court has stated that "where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice," it is generally appropriate to presume that Congress "kn[ew] and adopt[ed] the cluster of ideas that were attached to each borrowed word." *Morissette* v. *United States*, 342 U.S. 246, 263 (1952). That "canon on imputing common-law meaning," however, is subject to two important limi-

[9] Amicus EPIC asserts that "[i]dentity theft goes *beyond* the theft of one of the victim's attributes to the misappropriation of a person's very identity." Br. 11 (emphasis added; internal quotation marks and citation omitted). That contention underscores the dangers of giving controlling weight to an undefined term that appears only in a statute's title and legislative history. The statutory text makes clear that in order to violate Section 1028A(a)(1), a defendant need only transfer, use, or possess a single "means of identification" of another person, as that term is defined in 18 U.S.C. 1028(d)(7).

tations. *Carter*, 530 U.S. at 264. First, it is insufficient that the crime in question "bear[s] a close resemblance to" some common-law crime; Congress must make use of a "*term* with established meaning at common law." *Ibid.*; see *id.* at 265. Second, it is not enough for such a term to be contained in the statute's title or some extrinsic source; the term with an established common-law meaning must be contained "in the text of the statute." *Id.* at 264.

The limitations set forth in *Carter* preclude resort to the canon here. Petitioner contends that the term "theft" has a "traditional understanding" (Pet. Br. 13), but his reliance on that word is doubly flawed. For one thing, the authorities that petitioner cites fail to demonstrate that "theft" as opposed to "larceny," which is the actual term used in all of the pre-1990 authorities upon which petitioner relies[10] had an "established meaning at common law." *Carter*, 530 U.S. at 266. Cf. *United States* v. *Turley*, 352 U.S. 407, 411-412 (1957)

[10] See *Morissette*, 342 U.S. at 261 n.19 (Pet. Br. 16) (observing that "to take a horse running at large on the range is not larceny in the absence of an intent to deprive an owner of his property") (citing *Johnson* v. *State*, 36 Tex. 375 (1872)); *Regina* v. *Riley*, 169 Eng. Rep. 674 (1853) (Pet. Br. 16) (sustaining larceny conviction); *Regina* v. *Thurborn*, 169 Eng. Rep. 293, 293-294 (1848) (Pet. Br. 16) ("[T]he crime of larceny cannot be committed, unless the goods taken appear to have an owner, and the party taking them must know or believe that the taking is against the will of the owner."); Oliver Wendell Holmes, Jr., *The Common Law* 71 (1881) (Pet. Br. 15 n.3) (discussing the term "larceny"); 2 William Oldnall Russell, *A Treatise on Crimes and Indictable Misdemeanors* 98 (2d ed. 1828) (Pet. Br. 16) (chapter title: "Of Larceny"). The statute at issue in *Morissette* (Pet. Br. 15) likewise did not use the word "theft." Instead, it proscribed "embezzl[ing], steal[ing], purloin[ing], or knowingly convert[ing]" government property. 342 U.S. at 248 n.2 (quoting 18 U.S.C. 641 (Supp. V 1951)).

(refusing to apply canon with respect to Congress's use of the term "stolen" because the words "'stolen' (or 'stealing') ha[d] no accepted common-law meaning" and were not necessarily "coterminous with larceny and exclusive of other theft crimes"). And to the extent that "theft" has emerged as the name for a particular crime in the modern era, it has generally been used as a catch-all term that is designed to incorporate a number of common-law forebearers, of which larceny was simply one. 3 Wayne R. LaFave, *Substantive Criminal Law* § 19.8(c), at 145 (2d ed. 2003) (*LaFave*). Cf. *Bell* v. *United States*, 462 U.S. 356, 360 (1983) (stating that the phrase "intent to steal or purloin" in 18 U.S.C. 2113(b) "ha[d] no established meaning at common law" and construing that statute, whose language does not mirror or adopt the common-law elements of larceny, "to go beyond the common-law definition").

In addition, even the term "theft" appears only in the statute's short title and in the heading of Section 1028A as a whole. Such references are insufficient to trigger the canon's application. See *Carter*, 530 U.S. at 267 (concluding that canon "ha[d] no bearing" where the term "robbery" which had an established common-law meaning was contained solely in the statute's title).

b. Petitioner's reliance on the use of "theft" and "thieves" in locations other than the operative text of Section 1028A(a)(1) is flawed for another reason as well. Section 1028A(a)(1) is fundamentally a victim-focused statute. See pp. 20-27, *supra*. As a result, asking whether a person who engages in the conduct for which petitioner was convicted would typically be labeled a "thief," see, *e.g.*, Pet. Br. 5, 8; *Villanueva-Sotelo*, 515 F.3d at 1243, is to pose the wrong question. Petitioner used the social security and alien registration numbers

of innocent people in a manner that facilitated his commission of a federal felony. And it is perfectly natural to describe those people as having been "victim[s] of identity theft, whether [petitioner] knew that [he] was stealing [those people's] identit[ies] or not." *United States* v. *Godin*, 489 F. Supp. 2d 118, 121 (D. Me. 2007), rev'd, 534 F.3d 51 (1st Cir. 2008).

c. Petitioner's focus on the term "theft" is flawed for yet another reason. Regardless of how the Court resolves the specific question before it, it is clear that both the statute as a whole and Section 1028A(a)(1) in particular criminalize a great deal of conduct that would not have constituted common-law larceny. As a result, the premise of petitioner's argument that the term "theft" as used in the statute's title and the heading of Section 1028A should be understood to be synonymous with common-law larceny fails on its own terms.

The "[a]ggravated identity theft" heading on which petitioner relies does not introduce Section 1028A(a)(1), the provision under which petitioner was convicted. Rather, it introduces Section 1028A in its entirety, including Subsection (a)(2), the terrorism-related provision. And in that subsection, Congress has clearly created an offense that would not constitute common-law larceny, because it has no requirement that the "false identification document" in question be that of an actual person. See 18 U.S.C. 1028A(a)(2); see also 18 U.S.C. 1028(d)(4) (definition of "false identification document"). Common-law larceny, in contrast, required that the property in question have an "owner," *Morissette*, 342 U.S. at 261 n.19; Oliver Wendell Holmes, Jr., *The Common Law* 70-71 (1881) (*The Common Law*), as did the statute the Court construed in *Morissette*, see 342 U.S. at 248 n.2.

It is also clear that—regardless of how the Court resolves this case many people who violate Section 1028A(a)(1) would not be "a thief in the traditional sense of the word." *United States* v. *Montejo*, 353 F. Supp. 2d 643, 654 (E.D. Va. 2005), aff'd, 442 F.3d 213 (4th Cir.), cert. denied, 549 U.S. 879 (2006). As the very authorities upon which petitioner relies demonstrate (see Pet. Br. 15-16 & n.3), common-law larceny also required a "taking and removing, by trespass, of personal property * * * with intent to deprive such owner of his ownership therein." *The Common Law* 71 (citation omitted).

A modern identity thief could certainly obtain a particular means of identification by stealing a tangible item such as a driver's license or credit card. But it is equally (if not more) likely that he will obtain it from a piece of tangible personal property that the victim has deliberately abandoned (such as discarded mail) or use the means of identification in a manner that does not deprive the victim of its use (as with a defendant who uses someone else's social security number on an employment form). And "[n]othing in the plain language of the statute requires that the means of identification have been stolen for a § 1028A(a)(1) violation to occur." *Hurtado*, 508 F.3d at 607; see *Godin*, 534 F.3d at 60 (observing that "several of the anecdotal examples of identity theft [given in the *House Report*] describe crimes that did not involve stealing a means of identification *from* another") (emphasis added). It is likewise far from clear that a "name or number that may be used, alone or in conjunction with any other information, to identify a specific individual" (18 U.S.C. 1028(d)(7)) would have been considered "personal property" for purposes of common-law larceny. Cf. 3 *LaFave* § 19.4(a), at 78 ("At common law one could not steal intangible personal

property, including such substantial choses in action as stocks, bonds, checks or promissory notes, all of which are in the form of documents.").

d. Petitioner is correct that most of the examples given in Section 1028A(a)(1)'s legislative history involve situations where "the defendant clearly knew that the identification he or she was using belonged to another person." Pet. Br. 16. But see *id.* at 17 (acknowledging that "the state of the defendant's knowledge in [some] examples [given in the legislative history] might be subject to debate"). Like a statute's title, however, legislative history has "a role in statutory interpretation *only* to the extent [it] shed[s] a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (emphasis added). Here, there is no "ambiguous term[]" (*ibid.*) whose meaning could be illuminated by the examples the drafters of the *House Report* chose to highlight.

At any rate, if legislative history is to be considered in assessing Section 1028A(a)(1)'s meaning, the most significant legislative history is the *House Report*'s flat statement that "[t]he terms 'identity theft' and 'identity fraud' refer to *all types* of crimes in which someone wrongfully obtains and uses another person's personal data in some way that involves fraud or deception." *House Report* 4 (emphasis added). That definition makes clear that petitioner is indeed an "identity th[ief]" as the rest of the *House Report* uses that term.

The fact that crimes like petitioner's "did not make the 'worst case' list [recited in the *House Report*] does not mean that" it is not covered by Section 1028A(a)(1). *Villanueva-Sotelo*, 515 F.3d at 1254 (Henderson, J., dissenting). It is understandable that the *House Report*'s

drafters would have focused on "the most notorious cases in which defendants had received 'light' punishment under the then-existing law." *Ibid.* (Henderson, J., dissenting). And even if the prototypical cases envisioned by the drafters generally involved wrongdoers who knew that the means of identification in question was that of an actual person, "statutory prohibitions often go beyond the principal evil [contemplated by their drafters] to cover reasonably comparable evils," *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).[11]

C. Petitioner's Proposed Construction Is Not Necessary To Avoid Criminalizing Apparently Innocent Or Otherwise Lawful Conduct

This Court has stated on several occasions that there is a presumption against construing statutes in a way that would "criminalize a broad range of apparently innocent conduct," *Liparota*, 471 U.S. at 426, or authorize liability in the absence of an "evil-meaning mind," *Morissette*, 342 U.S. at 251. See *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 703 (2005); *X-Citement*

[11] Amicus AHR asserts (at 21) that the Court should resolve this case by reference to Congress's "overarching approach to false document offenses in the immigration law." The relevant question here is Congress's intent with respect to Section 1028A(a)(1), and amicus AHR identifies no reason for believing that Congress viewed that statute as incorporating a series of broader principles supposedly derived from immigration law. That omission is unsurprising, because Section 1028A(a)(1) is applicable with respect to a variety of predicate crimes outside the immigration context. See, *e.g.*, 18 U.S.C. 1028A(c)(1) (referencing certain offenses "relating to theft, embezzlement, or misappropriation by bank officer or employee" or "theft from employee benefit plans"), (5) ("any provision contained in chapter 63 (relating to mail, bank, and wire fraud)"), and (11) (certain violations of the Social Security Act, 42 U.S.C. 301 *et seq.*).

Video, 513 U.S. at 70-73; *Staples*, 511 U.S. at 610, 612. That principle does not control here. The conduct proscribed by Section 1028A(a)(1) would not be innocent or appear lawful regardless of whether the defendant knew that the means of identification in question was that "of another person."

1. A conclusion that Section 1028A(a)(1)'s "knowingly" requirement does not apply to the words "of another person" would not result in the criminalization of any "apparently innocent conduct." *Liparota*, 471 U.S. at 426. That is because Section 1028A(a)(1) does not demarcate a line between legally innocent and criminally culpable conduct. Instead, like the statute at issue in *United States* v. *Ressam*, 128 S. Ct. 1858 (2008) a decision in which the Court did not even mention the interpretive principle upon which petitioner relies Section 1028A(a)(1) creates an offense that specifically requires, as an element, the commission of another federal felony. For that reason alone, a person who does no more than unwittingly transfer a stolen social security card (see Pet. Br. 24-25) clearly has not violated Section 1028A(a)(1).

The risk of sweeping in any "apparently innocent conduct" (*Liparota*, 471 U.S. at 426) is further neutralized by the fact that the predicate felonies "during" which a Section 1028A(a)(1) violation must occur will generally have their own *mens rea* requirement. As a result, Section 1028A(a)(1) only "applies to persons who should be well aware that their conduct is subject to public regulation." *United States* v. *Cook*, 76 F.3d 596, 601 (4th Cir.), cert. denied, 519 U.S. 939 (1996).

This case provides an apt illustration. By pleading guilty to the Section 1546(a) counts that formed the predicate for his Section 1028A(a)(1) convictions, peti-

tioner conceded that he "use[d] * * * document[s] prescribed * * * for entry into or evidence of authorized stay or employment in the United States" and that he did so "knowing [them] to be forged * * * or to have been * * * unlawfully obtained." 18 U.S.C. 1546(a). There is nothing "innocent" about that conduct regardless of whether petitioner also knew that the documents themselves, or the identifying information contained within them, were those "of another person." 18 U.S.C. 1028A(a)(1).

Petitioner and the courts that have adopted his proposed construction have also ignored the significance of Section 1028A(a)(1)'s "in relation to" requirement. See, *e.g.*, *Villanueva-Sotelo*, 515 F.3d at 1237 ("[r]educing" the statutory language "to its essence" in a way that eliminated the "during and in relation to" requirement). But the "in relation to" requirement is critical, because it makes clear that the defendant's transfer, possession, or use of the means of identification of another "cannot be the result of accident or coincidence." *Smith*, 508 U.S. at 238. Instead, it "must have some *purpose or effect* with respect to the" underlying felony and "must '*facilitat[e], or ha[ve] the potential of facilitating*,'" the predicate crime. *Ibid.* (emphases added; citation omitted).

Petitioner suggests that, under the court of appeals' construction, Section 1028A(a)(1) would apply to "someone who accidentally transposes the numbers of his own social security number in the course of committing a predicate offense * * * if it turns out that the garbled number happens to belong to someone else." Pet. Br. 22; see *id.* at 7. But petitioner does not attempt to explain how that kind of accidental and inadvertent use of a means of identification of another person would have

the effect of facilitating the commission of the underlying predicate crime.[12] In addition, any lingering concerns about criminalizing such conduct could be fully addressed by construing Section 1028A(a)(1)'s "knowingly" requirement as applicable to the words "without lawful authority." See n.3, *supra*. Petitioner's hypothetical thus provides no basis for interpreting Section 1028A(a)(1)'s "knowingly" requirement as extending to the words "of another person." See *Carter*, 530 U.S. at 269 ("The presumption in favor of scienter requires a court to read into a statute *only* that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'") (emphasis added; citation omitted).

2. Petitioner attempts to draw support from the government's statement in its brief to the D.C. Circuit in *Villanueva-Sotelo* that it "seem[ed] clear that the 'word "knowingly" [in Section 1028A(a)(1)] must modify not just the verb[s], but also at least the object that immediately follows the verb[s], namely, "a means of identification."'" Govt C.A. Br. at 11 n.8, *Villanueva-Sotelo*, *supra* (No. 07-3055) (citation omitted). That "concession" (Pet. Br. 10), which was made before a different court and in a different case, does not aid petitioner here.

As the next two sentences of the same brief explain, the statement upon which petitioner relies was expressly premised on the view that a contrary "reading would criminalize innocent conduct and be inconsistent

[12] Section 1028A(a)(1)'s "in relation to" requirement will do less independent work in cases, like this one, where the predicate felony involves unlawful use of documents. But Section 1028A(a)(1)'s predicates are not limited to document-related offenses, and, in other contexts, "the requirement that a defendant possess the identification during and in relation to an enumerated felony is a significant restriction." *Estrada-Sanchez*, 558 F. Supp. 2d at 135 n.6.

with congressional intent." Gov't C.A. Br. at 11 n.8, *Villanueva-Sotelo*, *supra* (No. 07-3055). For the reasons explained above, that premise appears to have been incorrect in light of Section 1028A(a)(1)'s "during and in relation to" clause. See pp. 34-35, *supra*. More importantly, the government has never made any such concession with respect to whether Section 1028A(a)(1)'s "knowingly" requirement applies to the words "of another person."

Petitioner counters that "it is hard to see how * * *, as a linguistic matter, the knowledge requirement [in Section 1028A(a)(1)] can only be read to extend to 'means of identification' but not to the qualifying phrase 'of another person.'" Pet. Br. 10. There would, of course, be no linguistic anomaly at all if the Court were either to: (1) give Section 1028A(a)(1) its "most natural grammatical reading" (*X-Citement Video*, 513 U.S. at 67) and hold that the "knowingly" requirement does not apply past the verbs that immediately follow it; or (2) hold that the effect of the "knowingly" requirement terminates with the comma following the words "without lawful authority."

In any event, a conclusion that Section 1028A(a)(1)'s "knowingly" requirement extends to the words "a means of identification" would not mandate the same conclusion with respect to the later words "of another person." Only the extension of the "knowingly" requirement to the words "of another person" would create a significant surplusage problem with respect to Subsection (a)(2). See pp. 12-16, *supra*. This Court has also made clear that "[t]he presumption in favor of scienter requires a court to read into a statute *only* that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct,'" *Carter*, 530 U.S. at 269 (quoting

X-Citement Video, 513 U.S. at 72) (emphasis added), and an extension of the "knowingly" requirement through the words "a means of identification" would be more than sufficient to address any such concerns.

Contrary to petitioner's assertion (Pet. Br. 10), this Court's decision in *X-Citement Video* is not to the contrary. In that case, the Court concluded that once the statutory term "knowingly" was "emancipated from merely modifying the verbs" that immediately followed it and was understood to "appl[y] to the sexually explicit conduct depicted" as well, it was "difficult" to avoid the conclusion that "knowingly" also applied to the statutory requirement regarding the age of the performers. 513 U.S. at 77-78. In the statute at issue in *X-Citement Video*, however, the age-of-the-performers requirement was located *between* the word "knowingly" and the sexually-explicit-conduct requirement, which made it particularly implausible, "as a matter of grammar" (*id.* at 77), that the "knowingly" requirement applied only to the latter. See *id.* at 68 (quoting 18 U.S.C. 2252(a)(1) and (2)). Here, in contrast, the words "a means of identification" precede the words "of another person," so there is no similar grammatical barrier to concluding that the "knowingly" requirement applies only to the former. In addition, the Court's conclusion in *X-Citement Video* that the "knowingly" requirement also applied to the age-of-the-performers requirement was also supported by the constitutional-avoidance canon, *id.* at 72, 78, and by the fact that, under that statute, "the age of the performers [was] *the crucial element* separating legal innocence from wrongful conduct, *id.* at 73 (emphasis added).

D. There Is No Presumption That A Defendant Must Be Aware Of All Facts That Are Necessary To Make His Conduct Unlawful Or Trigger An Enhanced Sentence

Petitioner asserts that there is a "longstanding presumption[]" that "mens rea requirements apply to all facts that make the defendant's conduct unlawful." Pet. Br. 13, 18 (initial capitalization and emphasis omitted).[13] Amici Professors of Criminal Law advance the even broader proposition (at 5-6, 17) that this Court should presume that a defendant must have a culpable mental state with respect to any fact that subjects him to heightened punishment.[14]

No such broad presumptions exist. In addition, their adoption would disservice congressional intent and threaten serious disruption of a great deal of well-settled authority.

1. a. This Court has stated that "criminal offenses requiring no *mens rea* have a 'generally disfavored status.'" *Liparota*, 471 U.S. at 426 (quoting *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 438 (1978)). Because "the existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence," *Dennis* v. *United States*, 341 U.S. 494, 500 (1951), the Court has determined that it is sometimes appropriate to "read *a* state-of-mind component into an offense even when the statutory definition

[13] Petitioner unquestionably had knowledge of facts sufficient to make his conduct "unlawful." See pp. 34-35, *supra*. Petitioner's argument, therefore, is more accurately characterized as being that there is a presumption that a defendant must know all of the facts that are necessary to establish a violation of a particular criminal statute.

[14] A similar argument is before the Court in *Dean* v. *United States*, cert. granted, No. 08-5274 (oral argument scheduled for Mar. 4, 2009).

d[oes] not in terms so provide," *United States Gypsum Co.*, 438 U.S. at 437 (emphasis added); accord *Staples*, 511 U.S. at 605 (construing statute that was entirely "silent concerning the *mens rea* required for a violation"). In other cases, as noted above, the Court has interpreted the scope of a statutorily prescribed *mens rea* requirement against a background presumption that statutes should not generally be read as criminalizing "apparently innocent conduct." *Liparota*, 471 U.S. at 426.

b. At the same time, however, the Court has made clear that "[t]he presumption of scienter" recognized in its cases is not absolute. Instead, the Court has stated that it "requires a court to read into a statute *only* that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter*, 530 U.S. at 269 (quoting *X-Citement Video*, 513 U.S. at 72) (emphasis added).

In *United States* v. *Balint*, 258 U.S. 250 (1922), for example, the Court unanimously held that a statute that made it unlawful to distribute opium or cocaine without a permit did not require proof that the defendant was aware of the permitting requirement. *Id.* at 254. To the contrary, the Court found nothing illogical about making those in "the business of dealing in these dangerous drugs" bear the burden of "ascertain[ing] at [their] peril whether [what they] sell[] comes within the inhibition of the statute." *Ibid.*

Similarly, in *United States* v. *Freed*, 401 U.S. 601 (1971), the Court construed a statute that made it unlawful for a person "to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record" (26 U.S.C. 5861(d)) as "*not* requir[ing] proof of knowledge that a firearm is *unregis-*

tered." *Staples*, 511 U.S. at 609 (first emphasis added). The defendant in *Freed* "knew that the items he had in his possession were grenades," *id.* at 608, and the Court emphasized that "one would hardly be surprised to learn that possession of hand grenades is not an innocent act," *Freed*, 401 U.S. at 609;[15] accord *United States* v. *International Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971) (describing *Balint* and *Freed* as standing for the proposition that "anyone who is aware that he is in possession of [dangerous or deleterious devices or products or obnoxious waste materials] must be presumed to be aware of" the possibility that such items may be subject to regulation).

The same is true of *Feola*, where this Court held that a defendant's awareness of the person's status is not required for a conviction under a statute criminalizing assaults on federal officers. See 420 U.S. at 684. After concluding that the statute's purpose of protecting federal officers would be frustrated by the imposition of such a requirement, see *id.* at 677-684; p. 23, *supra*, the Court also stated that its interpretation was "no snare for the unsuspecting" and "pose[d] no risk of unfairness to defendants," *Feola*, 420 U.S. at 685. The Court ex-

[15] In *Staples*, the Court concluded that, in light of "the background rule of common law favoring *mens rea*" and "the long tradition of widespread lawful gun ownership by private individuals in this country," a defendant who is charged under the same statute at issue in *Freed* must have "kn[own] of the features of his [particular firearm] that brought it within the scope of the Act." *Staples*, 511 U.S. at 610, 619. The contrast between *Freed* and *Staples* further undermines petitioner's claim that there is a presumption that the same *mens rea* is required with respect to every fact that makes a defendant's conduct a violation of a particular criminal statute. Accord *Liparota*, 471 U.S. at 423 n.5 ("The required mental state may of course be different for different elements of a crime.").

plained that "[a]lthough a perpetrator of a narcotics 'rip-off' * * * may be surprised to find that his intended victim is a federal officer in civilian apparel, he nonetheless knows from the very outset that his planned course of conduct is wrongful," and it distinguished a situation where "legitimate conduct becomes unlawful solely because of the identity of the individual or agency affected." *Ibid.*[16]

The other authorities relied upon by petitioner likewise fail to demonstrate the existence of the "presumption" he seeks to invoke. *X-Citement Video* did not announce (Pet. Br. 18) a policy of according maximum scope to all statutory scienter requirements. Instead, the Court stated that its reluctance "to simply follow the most grammatical reading of the statute" at issue was "heightened by our cases interpreting criminal statutes to include broadly applicable scienter requirements." 513 U.S. at 70. And, as the Court noted (*id.* at 70-71), the cases upon which it relied—*Morissette*, *United States*

[16] Petitioner attempts to dismiss *Feola* as having been based on a "'jurisdictional' elements" exception to what he claims is the general presumption that any statutory *mens rea* requirement applies to all facts that make the defendant's conduct unlawful. Pet. Br. 18 & n.4. But that argument assumes that such a broad presumption exists, and, for the reasons stated above, it does not. In addition, *Feola* cautioned that focusing on whether a particular requirement was "jurisdictional" had the "potential to mislead." *Feola*, 420 U.S. at 676 n.9. The Court explained "[t]he question * * * is not whether [a particular] requirement is jurisdictional, but whether it is jurisdictional *only*." *Id.* at 677 n.9 (emphasis added). And that latter determination, *Feola* indicates, is made using the regular tools of statutory construction, including consideration of statutory purpose (*id.* at 678-679, 684), legislative history (*id.* at 679-683), and whether labeling a particular requirement "jurisdictional only" would threaten to criminalize seemingly innocent or apparently lawful conduct (*id.* at 677 n.9, 685).

Gypsum Co., *Liparota*, and *Staples*—all implicated the presumptions that statutes imposing criminal liability have at least some *mens rea* requirement and should not lightly be construed to criminalize conduct that might reasonably be viewed as innocent or presumptively lawful in nature. The portions of the plurality opinion in *Rogers* v. *United States*, 522 U.S. 252 (1998), upon which petitioner relies (Pet. Br. 18) simply restate the Court's holding in *Staples*. Compare *Rogers*, 522 U.S. at 254, with *Staples*, 511 U.S. at 619-620. Finally, the statements from *Bryan* v. *United States*, 524 U.S. 184, 193 (1998), *Staples*, 511 U.S. at 605, and *Morissette*, 342 U.S. at 270-271, that petitioner quotes involved the determination of the *meaning* of a "knowingly" requirement rather than an assessment of its *scope* in a particular statute. Cf. NACDL Amicus Br. 12 (acknowledging that neither *Bryan* nor *Staples* "involved the question of the scope of a specified *mens rea* requirement").

2. Petitioner (see Pet. Br. 19-20) and his amici (see NACDL Br. 3-15) urge this Court to adopt, as a matter of federal law, a general principle of construction proposed in the American Law Institute's Model Penal Code. The relevant provision states that "[w]hen the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing between the material elements thereof, such provision shall apply to all material elements of the offense, unless a contrary purpose plainly appears." Model Penal Code § 2.02(4) (1985). That suggestion lacks merit.

a. This Court has made clear that courts "must follow Congress' intent as to the required level of mental culpability for any particular offense." *United States* v. *Bailey*, 444 U.S. 394, 406 (1980). Congress has directed

courts to follow certain interpretive precepts in construing its enactments. See, *e.g.*, 1 U.S.C. 1 (Dictionary Act). Congress has not, however, directed courts to follow the Model Penal Code's approach in construing the reach of *mens rea* requirements in federal criminal statutes. Cf. NADCL Amicus Br. 9 n.2 (noting that "[a]t least eighteen American states have codified this interpretive canon by statute"). That fact alone should be the end of the matter.

b. This Court presumes that Congress is familiar with prevailing common-law precepts and may contemplate that courts would use them to fill gaps in statutes. See *Dixon* v. *United States*, 548 U.S. 1, 12 (2006). But Congress cannot be presumed to have enacted Section 1028A(a)(1) against any background assumption that courts will follow the Model Penal Code's approach to assessing the reach of statutory *mens rea* requirements. Although this Court has referred to the Model Penal Code for various other purposes, see Pet. Br. 19 n.6; NACDL Amicus Br. 6, the Court has not found it useful to assume that Congress would follow the Model Penal Code when that Code departs from, rather than reflects, "'well established' federal law," *id.* at 16 (citation omitted); see *id.* at 15-16 (giving "no weight" to the Model Penal Code's approach to the duress defense, in the absence of "evidence that Congress endorsed the Code's views or incorporated them into the [relevant statutes]").

In fact, this Court has conspicuously failed to adopt the Model Penal Code's proposed approach to analyzing questions like those presented here. The Model Penal Code was adopted by the American Law Institute in 1962. See *Manual Enters., Inc.* v. *Day*, 370 U.S. 478, 486 n.8 (1962). In the more than four decades between the Model Penal Code's promulgation and Section

1028A(a)(1)'s 2004 enactment, this Court decided at least three cases that involved the interpretation of a federal statute in which "knowingly" was followed by a series of verbs and where the question was whether the "knowingly" requirement applied to other aspects of the statute *United States* v. *Yermain*, 468 U.S. 63 (1984), *Liparota* (1985), and *X-Citement Video* (1994). In none of those cases did the Court even cite the proposed rule of construction set forth in Section 2.02(4) of the Model Penal Code.[17] The Court's failure to do so in *Liparota* is particularly significant given that the petitioner in that case expressly urged the Court to adopt the Model Penal Code's approach, see *Liparota* Pet. Br. at 17; Pet. Rep. Br. at 1, and that the Court's decision cited the Model Penal Code for other purposes, see 471 U.S. at 425 n.9.

c. This Court's failure to adopt the Model Penal Code's approach is well-justified. Federal criminal statutes have widely varying texts, contexts, purposes, legislative histories, and backgrounds. Yet petitioner and his amici advocate an across-the-board presumption that "could not ordinarily be overcome" by a conclusion that an alternate reading of a statute is "the 'most grammatical'" or by reference to "legislative history, comparisons to common law analogues, comparisons to related statutes, or the difficulty of prosecution." NACDL Amicus Br. 6. There is no basis for believing that such a context-ignoring approach would reliably capture congressional intent.

d. As petitioner notes (Pet. Br. 20), there can be "virtue [in] giving legislators a predictable background rule against which to legislate." *Landgraf* v. *USI Film*

[17] The Court likewise did not mention the Model Penal Code's proposed approach in *Arthur Andersen* or *Williams*, which were decided after Section 1028A(a)(1)'s enactment.

Prods., 511 U.S. 244, 273 (1994). For any such "background rule" to properly serve that purpose, however, Congress must be aware of the rule before it acts and the *source* of the rule must be such that it is appropriate to inpute to Congress an intent to follow it. Cf. *Cannon* v. *University of Chicago*, 441 U.S. 677, 698-699 (1979) (stating that the Court's "evaluation of congressional action in 1972 must take into account its contemporary legal context"). The Congress that enacted Section 1028A(a)(1) in 2004 cannot possibly be viewed as having been on notice, or intended, that it would be viewed through the lens of a four-decades-old proposal that the Court has not, even to this point, so much as referenced.

3. The adoption of the broad presumptions urged by petitioner and his *amici* would not simply be unprecedented. It would also risk disruption of a great deal of well-settled authority with respect to the construction of other federal criminal statutes.

The most notable potential consequences would relate to the federal drug statutes. Any "knowing[] and intentional[]" manufacture, distribution, or possession with intent to distribute of "a controlled substance" is a federal crime unless the defendant has a valid permit. 21 U.S.C. 841(a). In addition, Congress has enacted a number of other provisions that prescribe enhanced punishment for those who engage in drug trafficking in a particular way or in a particular place. For example, a defendant "who violates section 841(a)(1)," and whose violation occurs "in or on, or within one thousand feet of" a school, is subject to "twice the maximum punishment" that would otherwise be authorized. 21 U.S.C. 860(a). The courts of appeals that have considered the question have uniformly held that 21 U.S.C. 841(a)(1)'s "know-

ingly" requirement does not require the defendant have been aware of his proximity to the school.[18]

The same is true with respect to determinations regarding drug quantity. The amount of drugs involved in a Section 841(a) offense can result in a substantial increase in the defendant's maximum sentence. Compare 21 U.S.C. 841(b)(1)(A), with 21 U.S.C. 841(b)(1)(C). As a result, this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), requires the government to prove drug quantity to the jury in order to obtain such an enhanced maximum sentence. See *United States* v. *Cotton*, 535 U.S. 625, 632 (2002). Notwithstanding that fact, however, the courts of appeals have uniformly held that the government need *not* prove that the defendant had knowledge of the quantity of the drugs involved. See, *e.g.*, *United States* v. *King*, 345 F.3d 149, 153 (2d Cir. 2003) (citing cases), cert. denied, 540 U.S. 1167 (2004).

Nor have the courts of appeals followed petitioner's proposed approach in situations where the provision calling for an enhanced sentence clearly creates a separate offense and contains its own express *mens rea* requirement. For example, 21 U.S.C. 861(a) makes it unlawful to "knowingly and intentionally—(1) employ * * * [or] use * * * a person under eighteen years of age to violate" various federal drug laws, including Section 841(a). 21 U.S.C. 861(a)(1). The courts of appeals that have con-

[18] See *Falu*, 776 F.2d at 50; see also *United States* v. *Jackson*, 443 F.3d 293, 299 (3d Cir. 2006); *United States* v. *Cross*, 900 F.2d 66, 69 (6th Cir. 1990); *United States* v. *Dimas*, 3 F.3d 1015, 1022 (7th Cir. 1993); *United States* v. *Lewin*, 900 F.2d 145, 148 (8th Cir. 1990); *United States* v. *Pitts*, 908 F.2d 458, 461 (9th Cir. 1990); *United States* v. *DeLuna*, 10 F.3d 1529, 1534 (10th Cir. 1993) (aiding and abetting a 21 U.S.C. 860 violation); *United States* v. *Holland*, 810 F.2d 1215, 1222-1224 (D.C. Cir.), cert. denied, 481 U.S. 1057 (1987).

sidered the question including the D.C. Circuit in an opinion by then-Judge Ginsburg—have uniformly held that Section 861(a)(1) *does not* require the government to prove that the defendant knew that the person in question was less than eighteen years old. See *Chin*, 981 F.2d at 1280; see also *United States* v. *Frazier*, 213 F.3d 409, 418-419 (7th Cir.) (citing cases), cert. denied, 531 U.S. 1015 (2000).[19]

4. More broadly, it is routine for criminal defendants who have the same culpable mental state to be subject to different levels of punishment based on the often unplanned and unintended consequences of their actions. The felony-murder rule rests on just such a premise. Other examples abound. For example, attempts are generally punished less severely than completed crimes, see 2 *LaFave* § 11.5(c), at 251, even though both groups of wrongdoers meant to commit precisely the same wrongful act. A defendant who sought only to wound his victim may find himself charged with manslaughter or even murder if the victim dies. See *id.* §§ 14.3, 14.4, 15.4(d), at 434, 436-437, 528. And, most pertinently here, a person who knowingly chooses to commit one offense (for exam-

[19] Because employing a minor to sell drugs is not a "sex offense[]," these decisions cannot be explained by the fact that the common-law presumption in favor of *mens rea* did not apply to "sex offenses, such as rape, in which the victim's actual age was determinative despite defendant's reasonable belief that the girl had reached age of consent," *Morissette*, 342 U.S. at 251 n.8. Cf. *United States* v. *Griffith*, 284 F.3d 338, 351 (2d Cir.) (holding that a defendant need not know the victim's true age under 18 U.S.C. 2423(a) (2000), which makes it unlawful to "knowingly transport[] an individual who has not attained the age of 18 in interstate or foreign commerce * * * with the intent that the person engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense"), cert. denied, 537 U.S. 986 (2002).

ple, operating a car after using drugs) may find himself charged with a far greater one if his conduct results in harm to another person. 1 *LaFave* § 6.4(a), at 465; 2 *LaFave* § 15.5, at 531. These examples underscore that criminal law often refrains from requiring a culpable mental state with respect to a fact that triggers increased punishment for a defendant who has already been determined to have committed a crime.

E. There Is No Reason To Resort To The Rule Of Lenity

1. Petitioner and his amici misunderstand the trigger for the rule of lenity. The rule does not apply simply because there is "some statutory ambiguity," *Muscarello* v. *United States*, 524 U.S. 125, 138 (1998), or because it is "*possible* to articulate a construction more narrow than that urged by the Government," *Moskal* v. *United States*, 498 U.S. 103, 108, 118 (1990). "The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 410 (1991) (citation omitted).

As a result, resort to the rule of lenity is appropriate only when there is a "grievous ambiguity" in the statutory text, such that, "after seizing every thing from which aid can be derived, . . . [the Court] can make no more than a guess as to what Congress intended." *Muscarello*, 524 U.S. at 138-139 (citation omitted). In determining whether that standard is satisfied, the Court has stated that it is appropriate to consider "the language and structure, legislative history, and motivating policies of the statute," *Moskal*, 498 U.S. at 108 (internal quotation marks and citation omitted), and it has refused to apply the rule where a defendant's interpretation rested

on "an implausible reading of the congressional purpose," *Caron* v. *United States*, 524 U.S. 308, 316 (1998); accord *Liparota*, 471 U.S. at 427 (stating that the rule of lenity "is not to be applied where to do so would conflict with the implied or expressed intent of Congress").

There is no "grievous ambiguity" (*Muscarello*, 524 U.S. at 138) in this case. For all the reasons identified above, an examination of statutory text, history, and purpose demonstrates that Section 1028A(a)(1) does not require the government to establish that the defendant knew the means of identification in question was that of another actual person. This is "not a case of guesswork reaching out for lenity," *United States* v. *Wells*, 519 U.S. 482, 499 (1997), or one where, "after consulting traditional canons of statutory construction, [the Court is] left with an ambiguous statute." *Shabani*, 513 U.S. at 17.

2. Petitioner errs in asserting (Pet. Br. 37) that resort to the rule of lenity "is especially appropriate in the context of provisions like Section 1028A." This Court has stated that the rule of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980). But even if lenity concerns are not eliminated in the sentencing context, they are particularly attenuated where, as here, the provision in question does not demarcate a line between legally innocent and criminally culpable conduct, but instead involves an offense that requires, as an element, the commission of a different felony. Cf. *Ressam*, *supra* (rejecting defendant's proposed interpretation of such a statute without mentioning the rule of lenity).

Contrary to the suggestions of petitioner and his amici (see Pet. Br. 37; NACDL Amicus Br. 18-20), the fact that Congress has prescribed a mandatory penalty

for a given offense is entitled to no special weight in the rule-of-lenity analysis. As petitioner acknowledges (Pet. Br. 34), the fundamental purposes of the rule are to ensure that defendants have fair warning of the boundaries of criminal conduct, and that Congress, not courts, defines the scope of criminal liability. See *Crandon* v. *United States*, 494 U.S. 152, 158 (1990); *United States* v. *Kozminski*, 487 U.S. 931, 952 (1988); *United States* v. *Bass*, 404 U.S. 336, 348 (1971).

Neither of those purposes warrants applying an especially stringent version of the rule of lenity for statutes that prescribe mandatory penalties. A mandatory penalty adds to, rather than detracts from, the clarity of the warning provided by the underlying criminal statute. See *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931) (Holmes, J.) (stating that "a fair warning should be given to the world * * * *of what the law intends to do* if a certain line is passed") (emphasis added). Such statutes in no way detract from traditional judicial powers. Cf. Pet. Br. 37. This Court has recognized that Congress has unquestioned "power to define criminal punishments without giving the courts any sentencing discretion." *Chapman* v. *United States*, 500 U.S. 453, 467 (1991). Indeed, "[d]eterminate sentences were found in this country's penal codes from its inception." *Ibid.* While Congress may choose to permit individualized tailoring of sentences, that is only a matter of "public policy." *Ibid.* (citation omitted). Thus, this Court has previously rejected applying the rule of lenity to a statute providing for a mandatory minimum, without any suggestion that the statute's mandatory character warranted heightened lenity concerns. *Id.* at 463-464.

Petitioner also asserts (Pet. Br. 38) that "unduly broad interpretations of statutes with mandatory mini-

mum sentences also risk aggrandizing the discretionary authority (and institutional power) of federal prosecutors." That is a broadside attack on mandatory minimums, not an argument about the rule of lenity. And prosecutorial discretion is "an integral feature of the criminal justice system, and is appropriate, so long as it is not based upon improper factors." *United States* v. *LaBonte*, 520 U.S. 751, 762 (1997).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 1028A provides:

Aggravated identity theft

(a) OFFENSES.

(1) IN GENERAL.—Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

(2) TERRORISM OFFENSE. Whoever, during and in relation to any felony violation enumerated in section 2332b(g)(5)(B), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person or a false identification document shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 5 years.

(b) CONSECUTIVE SENTENCE. Notwithstanding any other provision of law—

(1) a court shall not place on probation any person convicted of a violation of this section;

(2) except as provided in paragraph (4), no term of imprisonment imposed on a person under this section shall run concurrently with any other term of imprisonment imposed on the person under any other provision of law, including any term of imprisonment imposed for the felony during which the means of identification was transferred, possessed, or used;

(3) in determining any term of imprisonment to be imposed for the felony during which the means of identification was transferred, possessed, or used, a court shall not in any way reduce the term to be imposed for such crime so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for a violation of this section; and

(4) a term of imprisonment imposed on a person for a violation of this section may, in the discretion of the court, run concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28.

(c) DEFINITION. For purposes of this section, the term "felony violation enumerated in subsection (c)" means any offense that is a felony violation of

(1) section 641 (relating to theft of public money, property, or rewards[1]), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), or section 664 (relating to theft from employee benefit plans);

(2) section 911 (relating to false personation of citizenship);

(3) section 922(a)(6) (relating to false statements in connection with the acquisition of a firearm);

[1] So in original. Probably should be "records".

(4) any provision contained in this chapter (relating to fraud and false statements), other than this section or section 1028(a)(7);

(5) any provision contained in chapter 63 (relating to mail, bank, and wire fraud);

(6) any provision contained in chapter 69 (relating to nationality and citizenship);

(7) any provision contained in chapter 75 (relating to passports and visas);

(8) section 523 of the Gramm-Leach-Bliley Act (15 U.S.C. 6823) (relating to obtaining customer information by false pretenses);

(9) section 243 or 266 of the Immigration and Nationality Act (8 U.S.C. 1253 and 1306) (relating to willfully failing to leave the United States after deportation and creating a counterfeit alien registration card);

(10) any provision contained in chapter 8 of title II of the Immigration and Nationality Act (8 U.S.C. 1321 et seq.) (relating to various immigration offenses); or

(11) section 208, 811, 1107(b), 1128B(a), or 1632 of the Social Security Act (42 U.S.C. 408, 1011, 1307(b), 1320a-7b(a), and 1383a) (relating to false statements relating to programs under the Act).

2. 18 U.S.C. 1028 provides in pertinent part:

Fraud and related activity in connection with identification documents, authentication features, and information

* * * * *

(d) In this section and section 1028A

* * * * *

(4) the term "false identification document" means a document of a type intended or commonly accepted for the purposes of identification of individuals that

(A) is not issued by or under the authority of a governmental entity or was issued under the authority of a governmental entity but was subsequently altered for purposes of deceit; and

(B) appears to be issued by or under the authority of the United States Government, a State, a political subdivision of a State, a sponsoring entity of an event designated by the President as a specified event of national significance, a foreign government, a political subdivision of a foreign government, or an international governmental or quasi-governmental organization;

* * * * *

(7) the term "means of identification" means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any

(A) name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;

(B) unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

(C) unique electronic identification number, address, or routing code; or

(D) telecommunication identifying information or access device (as defined in section 1029(e));

* * * * *

3. 18 U.S.C. 1546 provides in pertinent part:

Fraud and misuse of visas, permits, and other documents

(a) Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained;

* * * * *

Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929(a) of this title)), 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.

4. 18 U.S.C. 2252A provides in pertinent part:

Certain activities relating to material constituting or containing child pornography

(a) Any person who

* * * * *

(3) knowingly

(A) reproduces any child pornography for distribution through the mails, or in interstate or foreign commerce by any means, including by computer; or

(B) advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains

(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

(ii) a visual depiction of an actual minor engaging in sexually explicit conduct;

* * * * *

5. 18 U.S.C. 2252(a)(1) and (2) provide in pertinent part:

Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

* * * * *

shall be punished as provided in subsection (b) of this section.

* * * * *

REPLY BRIEF

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IN THE

Supreme Court of the United States

IGNACIO FLORES-FIGUEROA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

REPLY BRIEF FOR THE PETITIONER 1

I. The Government's Reading Of The "Aggravated Identity Theft" Statute Is Incompatible With Section 1028A's Text. 2

A. "Knowingly" Is Not Limited To The Provision's Verbs. 3

B. Nor Can "Knowingly" Be Extended Only So Far As "Without Lawful Authority." 8

C. Extending "Knowingly" To "Means of Identification" But Not To "Of Another Person" Is The Least Textually Tenable Construction Of All 9

II. The Most Natural Reading Of The Text Is Consistent With Background Assumptions About The Meaning Of "Theft" And The Scope Of Mens Rea Requirements 15

A. The Traditional Understanding of "Theft" .. 15

B. The Traditional Scope Of Mens Rea Requirements 18

III. Petitioner's Reading Is Consistent With The Statute's Purposes. 22

IV. At A Minimum, Section 1028A(a)(1) Is Ambiguous, Requiring Application Of The Rule of Lenity. 28

CONCLUSION 30

APPENDIX 1a

Appendix A, Collected Example Sentences From Petitioner's Briefs 1a

Appendix B, 18 U.S.C. § 1028(d) 6a

Appendix C, 18 U.S.C. § 2252(a) 11a

Appendix D, 21 U.S.C. § 841(a)-(b)(1)(A) 13a

Appendix E, 21 U.S.C. § 860(a) 18a

Appendix F, 18 U.S.C. § 1546(a) 20a

Appendix G, 18 U.S.C. § 922(q)(2)(a) 23a

Appendix H, 18 U.S.C. § 1040(a) 24a

TABLE OF AUTHORITIES

Cases

Almendarez-Torres v. United States,
523 U.S. 22 (1998) 16

Bell v. United States,
462 U.S. 356 (1983) 18

Carter v. United States,
530 U.S. 255 (2000) ..... passim

Crandon v. United States,
494 U.S. 152 (1990) 29

Gonzalez v. Duenas-Alvarez,
127 S. Ct. 815 (2007) 18

Hughey v. United States,
495 U.S. 411 (1990) 29

Liparota v. United States,
471 U.S. 419 (1985) ..... passim

McNally v. United States,
483 U.S. 350 (1987) 29

Molzof v. United States,
502 U.S. 301 (1992) 18

Morissette v. United States,
342 U.S. 246 (1952) 18, 21, 27

Ratzlaf v. United States,
510 U.S. 135 (1994) 9

Rodriguez v. United States,
480 U.S. 522 (1987) 23

Smith v. United States,
508 U.S. 223 (1993) 6

Staples v. United States,
511 U.S. 600 (1994) 19, 24

United States v. Atlantic Research Corp.,
127 S. Ct. 2331 (2007) 8

United States v. Balint,
258 U.S. 250 (1922) 21

United States v. Chin,
981 F.2d 1275 (D.C. Cir. 1992) 22

United States v. Feola,
420 U.S. 671 (1975) 21, 23, 24

United States v. Freed,
401 U.S. 601 (1971) 21

United States v. Granderson,
511 U.S. 39 (1994) 29

United States v. International Minerals & Chem. Corp, 402 U.S. 558 (1971) 21

United States v. Miranda-Lopez,
532 F.3d 1034 (9th Cir. 2008) 6, 8

United States v. Pasillas-Gayton,
192 F.3d 864 (9th Cir. 1999) 19

United States v. Turley,
352 U.S. 407 (1957) 17, 18

United States v. United States Gypsum Co.,
438 U.S. 422 (1978) 21

United States v. Villanueva-Sotelo,
515 F.3d 1234 (D.C. Cir. 2008) 13, 17

United States v. X-Citement Video, Inc.,
513 U.S. 64 (1994) ..... passim

United States v. Yermian,
468 U.S. 63 (1984) 21

Statutes

18 U.S.C. § 1028(d)(4) 7
18 U.S.C. § 1028A 25
18 U.S.C. § 1028A(a)(1) ..... passim
18 U.S.C. § 1028A(a)(2) 6, 7
18 U.S.C. § 1040(a)(2) 15
18 U.S.C. § 1546(a) 15
18 U.S.C. § 2252(a) 4, 5, 14
18 U.S.C. § 2252(a)(1) 5
18 U.S.C. § 3663(a)(1)(A) 27
18 U.S.C. § 922(q)(2)(A) 15
21 U.S.C. § 841(b)(1)(A) 14
21 U.S.C. § 860(a) 14, 25
21 U.S.C. § 861(a)(1) 22

Other Authorities

WILLIAM BLACKSTONE, IV COMMENTARIES ON THE LAWS OF ENGLAND (1800) 17

Dan Boyd, *Capitol Web Cast Ruffles Feathers: Lawmaker Chided for Broadcasting Legislative Committee Meeting*, ALBUQUERQUE J., Jan. 27, 2009 13

Paul Elias, *Feds Press Harder on Bonds' Trainer; Agents Raid Home of Anderson's in-Law*, CHI. TRIB., Jan. 29, 2009 11

John Eligon, *Lawyer Is Accused of Stealing Disabled People's Assets He Was Assigned to Protect*, N.Y. TIMES, Jan. 29, 2009 11

Michael Falcone, *Peanut Supplier Banned From Federal Business*, N.Y. TIMES, Feb. 6, 2009 11

H.R. Rep. 108-528 (2004), *as reprinted in* 2004 U.S.C.C.A.N. 779 ..... 16, 25

W. LAFAVE & A. SCOTT, CRIMINAL LAW (1972) 28

WAYNE R. LAFAVE, SUBSTATIVE CRIMINAL LAW (2d ed. 2003) 17, 18, 24

Maryland Briefing: Delegate's Jewelry Shop Among 18 in Violation, WASH. POST, Jan. 13, 2009 11

MODEL PENAL CODE (1985) 29

Steven Pearlstein, *Obama's SEC Pick Is No Joe Kennedy*, WASH. POST, Jan. 7, 2009 11

William Shughart, *Folly of Incentives*, Commentary, WASH. TIMES, Jan. 25, 2009 12

JAMES STEPHEN, IV STEPHEN'S COMMENTARIES ON THE LAWS OF ENGLAND (5th Ed. 1863) 17

WILLIAM STRUNK & E.B. WHITE, THE ELEMENTS OF STYLE (4th ed. 2000) 5

REPLY BRIEF FOR THE PETITIONER

This case begins, and should end, with the statutory language. Congress defined Aggravated Identity Theft to include only one who "knowingly transfers, possesses, or uses, without lawful authority, the means of identification of another person." 18 U.S.C. § 1028A(a)(1). In common discourse, to say that a person "knowingly uses" something is to say that he knows what it is that he is using. In fact, the Government is unable to come up with a single English sentence in which "knowingly used" would be construed to indicate only that the subject knew he was using *something*, although he did not know what it was. There is no reason to think that Congress intended Section 1028A(a)(1) to be the first. To the contrary, the common sense interpretation of its words is consistent with common law definitions of "theft," which also requires that the thief know that the property he has taken belongs to another.

Respondent nonetheless attempts to show that Congress's basic concerns about identity theft would be best served by a statute with a narrower mens rea requirement. Although limiting (or even omitting) a mens rea requirement from this (or any other) criminal statute might well advance an interest in protecting victims from harm, it runs counter to a basic presumption of our legal system that criminal punishment is reserved for, and calibrated to, a defendant's culpability, ordinarily requiring that the defendant at least be aware of all of the facts that make his conduct criminal. Departing from that rule in this case would engender serious anomalies, giving

markedly disparate punishment to defendants who engaged in the same conduct with the same basic knowledge and intentions, while at the same time giving identical punishments to defendants with vastly different levels of culpability. Even if one could imagine a Congress willing to abide such disparities in order to maximize protection against misuse of identification information, such speculation is no basis for reading a criminal statute against the grain of the text and in favor of the prosecution.

I. The Government's Reading Of The "Aggravated Identity Theft" Statute Is Incompatible With Section 1028A's Text.

The Government asserts that "[t]he most natural grammatical reading" of 18 U.S.C. § 1028A(a)(1) is that "the 'knowingly' requirement applies only" to the statute's verbs – "transfers, possesses, or uses." U.S. Br. 8. In the alternative, the Government argues that the knowledge requirement should extend only to the next words ("without lawful authority"). Or, as a backup to its backup argument, the United States suggests that the knowledge requirement might extend half-way through the phrase after that ("means of identification of another person"). U.S. Br. 12. Indeed, the only construction of the statute to which the Government is unwilling to agree is one that applies "knowingly" to the entirety of the direct object of the provision's transitive verbs. But that is precisely the construction the most natural reading of the text compels.

A. "Knowingly" Is Not Limited To The Provision's Verbs.

The Government's basic position is that as a general rule, a "knowingly" mens rea requirement applies only to the verbs the adverb directly modifies, unless a broader reading is required to avoid criminalizing innocent conduct. U.S. Br. 9-10, 37-38. This view is incompatible with common English usage and renders the knowledge requirement in Section 1028A(a)(1) surplusage.

1. To say that someone knowingly transfers, possesses, or uses something is to assert that she knows what it is that she is transferring, possessing, or using. *See generally* Petr. Br. 9; Linguists' Br. §§ A-B. To say that Susan knowingly transferred classified documents, that Charles knowingly possessed a baggie of cocaine, or that Jane knowingly used her mother's computer is to say that Susan knew that what she transferred were classified documents, that Charles knew that the substance in his pocket was cocaine, and that Jane knew that the computer she was using was her mother's and not her father's or her own.

Numerous other examples demonstrate this basic understanding. Petitioner provided many in his opening brief and the *amicus* brief for the Professors of Linguistics provided even more. *See infra* App. A (collecting petitioner's examples); Linguists' Br., App. C. In response, the Government quibbles unconvincingly with two of petitioner's

examples,[1] and asserts that the rest are "carefully selected" and "load the dice" in petitioner's favor. U.S. Br. 9. If this were true, it should have been easy for the Government to come up with a few counter-examples of its own. But neither it, nor its *amici*, has mustered even one.

The Government relies instead on its assertion that it is a basic rule of grammar that adverbs do not modify nouns. U.S. Br. 9. But as the Professors of Linguistics explain, and as petitioner's examples show, adverbs commonly modify verb *phrases*, which can include both a verb and its direct object. *See, e.g.*, Linguists' Br. 5-9 & n.8.

Nor is this Court's decision in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), to the contrary. There, the Court stated that "[t]he most natural grammatical reading" of 18 U.S.C. § 2252(a) "suggests that the term 'knowingly' modifies only the surrounding verbs . . . ." *Id.* at 68. But whether the knowledge requirement extended to the direct object of the verbs was not at issue in the case. Indeed, no one questioned that the Government was required to

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[1] The Government claims, for example, that the meaning of the sentence "John knowingly ate the last slice of pizza" is "overtaken by the reader's assumption that one normally knows what he is eating, which raises the inference that 'knowingly' must refer to something else." U.S. Br. 9. But by the same token, a reader normally would assume that someone who transfers, possesses, or uses something, "knows what he is" transferring, possessing, or using. *Id.* Accordingly, by the Government's logic, the word "knowingly" in Section 1028A(a)(1) "must refer to something else," *id.* – namely to the fact that the means of identification belongs to another person.

prove that the defendant at least knew that what he was "transport[ing] or ship[ping]" was a "visual depiction" and not, for example, a box of chocolates. 18 U.S.C. § 2252(a). Moreover, the Court concluded that the knowledge requirement was not naturally read to extend further to "the elements of the minority of the performers, or the sexually explicit nature of the material," not because of any general rule of grammar, but because those elements were "set forth in independent clauses separated by interruptive punctuation." *X-Citement Video*, 513 U.S. at 68; *see* 18 U.S.C. § 2252(a)(1) (reproduced in Appendix C).[2]

2. The Government's grammar rule also renders Section 1028A(a)(1)'s express mens rea requirement essentially meaningless.

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[2] The Government claims that the commas setting off the phrase "without lawful authority" in Section 1028A(a)(1) constitute a similar "structural barrier" that prevents "knowingly" from applying further into the sentence. U.S. Br. 12. But the commas in this provision serve a different function – identifying a parenthetical phrase. The *pair* of commas reflects Congress's understanding that the insertion of "without lawful authority" between the provision's verbs and their direct object interrupted the natural flow of the sentence. While the first comma does indeed "direct[] a reader to make a slight pause," U.S. Br. 12 (citation and quotation marks omitted), the second comma just as clearly informs the reader that the interruption is over and that the flow of the sentence now continues. *See* WILLIAM STRUNK & E.B. WHITE, THE ELEMENTS OF STYLE 2-5 (4th ed. 2000). Thus, for example, the assertion that "Jane knowingly used, without permission, her mother's computer" still is understood to assert that Jane knew that the computer she was using was her mother's.

Under the Government's view, the only role the knowledge requirement plays is to ensure that the defendant's transfer, possession, or use is not purely accidental. However, it is difficult to imagine how someone could "transfer[], possess[], or use[]" something without knowing it. But to the extent it could ever happen, such defendants are already protected from liability by the requirement that the transfer, possession, or use be "during and in relation to" a predicate offense, meaning that it "'must facilitate, or have the potential of facilitating,' the predicate crime." U.S. Br. 35 (quoting *Smith v. United States*, 508 U.S. 223, 238 (1993)) (internal punctuation omitted). It is impossible to imagine that someone who does not even know that she *has* someone else's means of identification could nonetheless use it in a way that facilitates a predicate offense. That being so, the word "knowingly" must be given a broader scope if it is to play any role in the statute's meaning.

3. The Government nonetheless argues that applying "knowingly" beyond the verbs will create a surplusage problem of its own. U.S. Br. 12-16. The fact the Government needs several pages to lay out the argument, borrowed from Judge Bybee's partial concurrence in *United States v. Miranda-Lopez*, 532 F.3d 1034, 1041-44 (9th Cir. 2008), suggests it is unlikely to shed light on congressional intent. But in any event, the Government's objection is founded upon a false premise, as an example will show.

Consider John, who fills in a form with a made-up social security number as part of a predicate offense under Section 1028A(a)(2). Under the Government's view, once it proves that John knew

that he "use[d], without lawful authority, a means of identification," it would be duplicative to require it to also prove that John knew he was using a means of identification "of another person" or "a false identification document." That is because a person who knowingly uses "a means of identification without lawful authority *must necessarily* know," U.S. Br. 14 (citation omitted) (emphasis added), that the identification is either a "means of identification of another person" or is a "false identification document."

But that simply is not so. In our example, John did not know whether the social security number he made up belonged to another person. But that does not mean he therefore must have known that he was using a "false identification document." In fact, in simply writing the made-up social security number, he did not use any identification *document* at all. *See* 18 U.S.C. § 1028(d)(4) (defining a "false identification document" as an altered or counterfeit physical "document").[3] Because the term "means of identification" is significantly broader than "identification document," it is entirely possible to knowingly use, without lawful authority, a false means of identification that is neither the "means of identification of another person" nor a "false identification document." Consequently, requiring the Government to prove the defendant's knowledge with respect to each element of a Section 1028A(a)(2) offense creates no surplusage in that provision, much less in Section 1028A(a)(1).

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[3] 18 U.S.C. § 1028(d) is reproduced in Appendix B.

In any case, the Government's proposed cure for the alleged surplusage is worse than the disease, relying on an entirely implausible view of the statutory language. *See United States v. Atlantic Research Corp.*, 127 S. Ct. 2331, 2337 (2007) (noting that it is "appropriate to tolerate a degree of surplusage rather than adopt a textually dubious construction that threatens to render the entire provision a nullity"). As discussed below, Judge Bybee's solution (extending the knowledge requirement to "without lawful authority" and "means of identification" but not to "of another person") is no better. *See infra* at 8-14. Moreover, it does not even resolve the surplusage problem, as both Judge Bybee and the Government acknowledge. *See Miranda-Lopez*, 532 F.3d at 1042 n.2; U.S. Br. 15-16.

B. Nor Can "Knowingly" Be Extended Only So Far As "Without Lawful Authority."

In the alternative, the Government suggests that, if necessary, the Court might extend the knowledge element past the verbs to the parenthetical phrase "without lawful authority," but no further. U.S. Br. 12. This fallback position has no more basis in the text than the Government's initial claim.

The parenthetical phrase "without lawful authority" does not limit the scope of "knowingly" in Section 1028A(a)(1). Saying that "Jane knowingly used, without permission, her mother's computer" is understood to assert that Jane knew that the computer she was using without permission was her mother's. It would be an exceedingly odd interpretation of the sentence to infer that Jane knew

only that she was using *something* and that she knew she did not have permission to use it, but that she did not necessarily know what it was that she was using. Likewise, just how a defendant can know that he lacks lawful authority to use a means of identification, when he does not even know that he is using a means of identification, is a mystery the Government makes no attempt to solve.

In addition, if any part of Section 1028A(a)(1) is textually isolated from the knowledge requirement, it is the parenthetical phrase "without lawful authority," which is set off from the rest of the sentence by commas and has a grammatically less direct connection to the verbs "knowingly" modifies than does the direct object. Moreover, extending the knowledge requirement to "without lawful authority" would run counter to the general presumption that ignorance of the law is no defense. *See, e.g*, *Ratzlaf v. United States*, 510 U.S. 135, 149 (1994).

C. Extending "Knowingly" To "Means of Identification" But Not To "Of Another Person" Is The Least Textually Tenable Construction Of All.

The Government's last stand is to argue that even if the defendant must know that he is using a "means of identification," he need not know that it is a "means of identification of another person." U.S. Br. 15. This argument presents the least plausible view of the text yet.

1. While the Government is able to articulate policy reasons why Congress might want to write a statute with a limited knowledge requirement, it offers scant evidence that Congress actually wrote

such a statute here. There is simply no textual cue whatsoever that Congress intended "knowingly" to extend to every word that follows, except the last three; that it intended to cover the first half of the direct object phrase "means of identification of another person," but not the second; or that it intended to encompass the direct object noun ("means") and one of the prepositional phrases that modifies it ("of identification"), but not the other ("of another person"). Once the word "knowingly" is "emancipated from merely modifying the verbs," and is conceded to extend to "means of identification," then "as a matter of grammar it is difficult to conclude that the word 'knowingly' modifies one of the elements in [the subsection,] but not the other." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77-78 (1994).

If Congress had intended the Government's interpretation, it surely would have provided some clear textual cue, because in common discourse, a word like "knowingly" is naturally understood to extend to the entirety of the direct object phrase of the transitive verbs it modifies. Petr. Br. 9; *see also* Linguists' Br. 10-13. Consider the following sentences, published in major newspapers in the past six weeks:

(1) "The food and drug agency and the Justice Department are conducting a criminal investigation into whether the Peanut

Corporation of America *knowingly sold contaminated products.*"[4]

(2) "Now the process is repeating itself as Schapiro and other regulators begin to clean up after underwriters who *knowingly peddled securities of questionable value* . . . ."[5]

(3) "Officers . . . are investigating whether employees *knowingly received stolen property.*"[6]

(4) "[The lawyer] . . . was under investigation on charges of *knowingly misappropriating clients' funds.*"[7]

(5) "Bonds . . . denied *knowingly using performance-enhancing drugs.*"[8]

(6) "Investors in private firms *knowingly assume the risks associated with economic*

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[4] Michael Falcone, *Peanut Supplier Banned From Federal Business*, N.Y. TIMES, Feb. 6, 2009 (emphasis added).

[5] Steven Pearlstein, *Obama's SEC Pick Is No Joe Kennedy*, WASH. POST, Jan. 7, 2009 (emphasis added).

[6] *Maryland Briefing: Delegate's Jewelry Shop Among 18 in Violation*, WASH. POST, Jan. 13, 2009 (emphasis added).

[7] John Eligon, *Lawyer Is Accused of Stealing Disabled People's Assets He Was Assigned to Protect*, N.Y. TIMES, Jan. 29, 2009 (emphasis added).

[8] Paul Elias, *Feds Press Harder on Bonds' Trainer; Agents Raid Home of Anderson's in-Law*, CHI. TRIB., Jan. 29, 2009 (emphasis added).

> *events* that affect their companies, industries and the broader economy."[9]

No one would understand the word "knowingly" in any of these sentences to refer to only a portion of the direct object phrase. In the first example, for instance, "knowingly" quite plainly applies not only to the verb "sold" and to the direct object noun "products" but also to the entirety of the direct object phrase "contaminated products." The same is true of the more complex direct object phrase "securities of questionable value" in the second example – the principal function of the word "knowingly" is to make clear that the underwriters knew that the securities they were selling were potentially worthless. And even the Government must admit that it could not charge Mr. Bonds with perjury for having claimed that he never "knowingly us[ed] performance-enhancing drugs" if the Government thought that Bonds honestly believed that he was injecting vitamins (not drugs) or antibiotic drugs (not performance-enhancing ones).

2. The Government nonetheless suggests (U.S. Br. 9) that there is significance in Congress's use of the phrase "means of identification *of another person*" rather than the possessive "*another person's* means of identification." Using the possessive, the Government contends, suggests that the subject knows to whom the object belongs. "A formulation that puts the modifier afterwards . . . does not *necessarily* convey

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[9] William Shughart, *Folly of Incentives*, Commentary, WASH. TIMES, Jan. 25, 2009 (emphasis added).

that implication." *Id.* (emphasis added). Frankly, petitioner "see[s] nothing of significance in that syntactic choice." *United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1239 (D.C. Cir. 2008). Few would think that there is any material difference between "Jane knowingly used, without permission, a toothbrush of another camper," and "Jane knowingly used, without permission, another camper's toothbrush." The overwhelmingly more plausible construction of either sentence is that Jane not only knew that she was using a toothbrush, but also knew that the toothbrush belonged to another camper. The same is true of other examples:

(7) "An Albuquerque lawmaker was criticized for 'grandstanding' Monday and knowingly subverting *the rules of the House of Representatives*."[10]

(8) The General knowingly risked *the lives of his soldiers* to achieve an important objective.

(9) The author knowingly used *the stories of everyday citizens* in his article to make his abstract theory more concrete.

In any case, even if there were some subtle difference in meaning between "another person's means of identification" and "a means of identification of another person," the Government cannot reasonably contend that Congress expected courts to divine the proper definition of the material

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[10] Dan Boyd, *Capitol Web Cast Ruffles Feathers: Lawmaker Chided for Broadcasting Legislative Committee Meeting*, ALBUQUERQUE J., Jan. 27, 2009 (emphasis added).

elements of this crime through such an exceedingly subtle cue.

3. In fact, if Congress had wanted to prevent Section 1028A(a)(1)'s knowledge requirement from reaching "of another person," it knew how to make that intention clear. For example, following the model of the statute construed in *X-Citement Video*, Congress could have referred to one who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification, if the means of identification belongs to another." *Cf.* 513 U.S. at 68 (concluding that a similar comma-"if" construction in 18 U.S.C. § 2252(a) would limit the natural reach of the knowledge requirement).

Or Congress could also have excluded the mens rea element altogether, as it did in the drug penalty enhacement provisions the Government cites. U.S. Br. 46-47. There, Congress codified an offense with a mens rea requirement in one provision and then separately provided for increased penalties (based on drug quantities or committing the offense near a school) in another provision that conspicuously *omits* any additional mens rea element. *See* 21 U.S.C. § 841(b)(1)(A) (drug quantities) (reproduced in Appendix D); *id.* § 860(a) (school proximity) (reproduced in Appendix E). But Congress did the opposite here – it drafted Section 1028A(a)(1) as a separate crime, not a sentencing enhancement, and expressly included a mens rea requirement.[11]

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[11] The Government suggests that Congress would have repeated "knowingly" multiple times in Section 1028A(a)(1) if it had intended the knowledge requirement to apply throughout

II. The Most Natural Reading Of The Text Is Consistent With Background Assumptions About The Meaning Of "Theft" And The Scope Of Mens Rea Requirements.

Petitioner's construction of the text draws further support from the traditional meaning of "theft" and the scope of conventional mens rea requirements in criminal statutes.

A. The Traditional Understanding of "Theft"

Congress intended the "Aggravated Identity Theft" provision, adopted as part of the "Identity Theft Penalty Enhancement Act," to define a kind of theft, which is commonly understood to encompass only the taking of property known to belong to another person. See Petr. Br. 15-16 & n.3. The Government disagrees, but its reasons for doing so are unpersuasive.

1. As an initial matter, the Government argues that *Carter v. United States*, 530 U.S. 255 (2000), precludes looking to the meaning of "theft" because the word appears in the titles, but not the body, of

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the provision. As described above, in light of common usage, no such repetition was unnecessary. Moreover, the statutes the Government cites (U.S. Br. 16-17) repeat the knowledge element either because the statute has multiple clauses defining multiple prohibited acts (*e.g.*, 18 U.S.C. § 1546(a), reproduced in Appendix F, or in order to introduce clauses that add requirements beyond those already included in the direct object phrase (*e.g.*, 18 U.S.C. §§ 922(q)(2)(A), 1040(a)(2), reproduced in Appendices G and H, respectively).

the statute. U.S. Br. 29. But *Carter* itself acknowledges that the title of a statute is useful "when [it] shed[s] light on some ambiguous word or phrase in the statue itself." 530 U.S. at 267 (citations omitted) (modifications in original); *see also, e.g.*, *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (same). Here, petitioner is simply urging the Court to construe Section 1028A(a)(1)'s express knowledge requirement in light of the titles.[12]

The legislative history confirms that Congress saw Section 1028A(a)(1) as establishing a form of theft. *See* Petr. Br. 14-15. The Government claims this is not so, pointing to a sentence in the House Report that states, "[t]he terms 'identity theft' and 'identity fraud' refer to all types of crimes in which someone wrongfully obtains and uses another person's personal data in some way that involves fraud or deception." H.R. Rep. 108-528, at 4 (2004), *as reprinted in* 2004 U.S.C.C.A.N. 779, 780. But this general statement – describing the *collective* scope of the distinct concepts of "identity theft" and "identity fraud," *cf.* U.S. Br. 20 n.6 (wrongly asserting Congress equated the two) – does not negate the implication of the text and other aspects of the legislative history that to "wrongly obtain" another person's identification, the defendant must know that what he is "obtaining" is the means of identification

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[12] By contrast the defendant in *Carter* did "not claim that [the] title illuminate[d] any such ambiguous language." 530 U.S. at 267. Instead, he urged the Court to rely on the title to import into the statute an element Congress had expressly omitted. *Id.* at 262, 264.

of another person. *See United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1244 (D.C. Cir. 2008). At the very least, this single statement is too slender a reed to counter the other strong indications that Congress saw identity theft as a form of theft.

2. The Government also argues that the Court should give no weight to the traditional understanding of theft because "theft," it says, is not a "'term with established meaning at common law.'" U.S. Br. 28 (quoting *Carter*, 530 U.S. at 264). This is simply incorrect.

While it is true that "theft" is no longer a word that describes a *specific* common law crime,[13] it is nonetheless a term with an established common law meaning, encompassing a class of crimes, including larceny, embezzlement, and false pretenses. *See* 3 WAYNE R. LAFAVE, SUBSTATIVE CRIMINAL LAW, § 19.1, at 56-61 (2d ed. 2003); *see also* U.S. Br. 29; *United States v. Turley*, 352 U.S. 407, 412 n.8 (1957).[14] In this way, the term "theft" is unlike the words "steal" and "stolen," which have only a colloquial meaning.

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[13] Initially, "theft" appears to have been the equivalent of common law larceny. *See, e.g.*, JAMES STEPHEN, IV STEPHEN'S COMMENTARIES ON THE LAWS OF ENGLAND 196 (5th ed. 1863) ("*Larceny*, or theft . . . is the unlawful taking and carrying away of things personal, with intent to deprive the owner of the same.") (footnotes omitted); WILLIAM BLACKSTONE, IV COMMENTARIES ON THE LAWS OF ENGLAND 229 (1800) (same)

[14] Accordingly, the Government's observation (U.S. Br. 30-32) that Section 1028A(a)(1) does not contain all the elements of common law larceny is beside the point. Congress saw the provision as establishing a form of theft, broadly understood, not larceny.

See Turley, 352 U.S. at 411-12; *Bell v. United States*, 462 U.S. 356, 360 (1983).

As a result, while it would be improper to imply into Section 1028A(a)(1) an element that is not common to all forms of theft, it is appropriate to look to the generic meaning of "theft" in interpreting the words Congress used to define what it viewed as a form of theft in a new and modern context. *Cf., e.g., Gonzalez v. Duenas-Alvarez*, 127 S. Ct. 815, 820 (2007) (construing statute's reference to "theft" as encompassing "a generic definition of theft").

The canon, after all, applies whenever "Congress borrows *terms of art* in which are accumulated the legal tradition," and thereby embraces a "cluster of ideas that [are] attached to each borrowed word," *Morissette v. United States*, 342 U.S. 246, 263 (1952) (emphasis added), not solely when Congress refers to a specific common law crime. *See, e.g., Molzof v. United States*, 502 U.S. 301, 306-08 (1992) (relying upon the common law definition of "punitive damages" to construe the Federal Tort Claims Act). And the Government does not deny that part of the "accumulated legal tradition" and "cluster of ideas" encompassed within the concept of "theft" in all its forms is the requirement that the defendant know that what he is taking belongs to another. *See* Petr. Br. 13-16; U.S. Br. 31; *Duenas-Alvarez*, 127 S. Ct. at 820; *cf. generally* LAFAVE, *supra*, ch. 19.

B. The Traditional Scope Of Mens Rea Requirements

Part of our legal tradition as well is the presumption that mens rea requirements ordinarily extend to all the elements of the offense, absent some

reason for a contrary construction. *See* Petr. Br. 18-20.

1. As this Court has observed, a "conventional mens rea requirement ... require[s] that the defendant know the facts that make his conduct illegal." *Staples v. United States*, 511 U.S. 600, 605 (1994); *see also* Petr. Br. 18. It is only natural that when confronted by a statute with a written mens rea requirement, courts should begin with the presumption that Congress intended a conventional one. *See, e.g., United States v. Pasillas-Gayton*, 192 F.3d 864, 868-69 (9th Cir. 1999). While the Court may not have articulated this commonsense principle as clearly as it has some canons of construction, the presumption is consistent with the Court's statements and holdings in other cases, and with the background rule of lenity. *See* Petr. Br. 18 & 34-38.

2. The Government contends that the Court's cases show that no such presumption exists. Indeed, relying on this Court's decisions in *United States v. X-Citement Video*, 513 U.S. 64 (1994), *Liparota v. United States*, 471 U.S. 419 (1985), and *Carter v. United States*, 530 U.S. 255 (2000), the Government insists that the Court has adopted nearly the opposite presumption, generally reading mens rea elements only as broadly as necessary to avoid criminalizing innocent conduct. U.S. Br. 37-38, 40-42. This view is mistaken.

In some cases, the Court has pointed to a risk of criminalizing innocent conduct as a reason to give a mens rea element unexpected and exceptional breadth. In *X-Citement Video*, for example, the Court relied on the consideration to construe a mens rea element more expansively that the "most natural

grammatical reading" of the text would otherwise indicate. 513 U.S. at 68; *see id.* at 72-73. In *Liparota*, the concern likewise was one factor that led the Court to construe the Food Stamps Act to require proof of a defendant's knowledge of the unlawfulness of his conduct, despite the ordinary presumption that a "mistake of law" is no defense. 471 U.S. at 425 n.9. In both cases, it was uncontroversial that the knowledge requirement extended to the direct object of the provision's verbs ("visual depiction" in *X-Citement Video*, 513 U.S. at 69; and "coupons or authorization cards" in *Liparota*, 471 U.S. at 423 n.5). Innocent conduct came into the analysis only to justify an even *broader* application.

In *Carter*, on the other hand, the Court did say that "[t]he presumption in favor of scienter requires a court to read into a statute only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" 530 U.S. at 269 (citation omitted). But as the quotation makes clear, this rule applies when a court is required to "read into a statute" a mens rea requirement that is not already there, a situation that has no relevance here. There is a world of difference between cases in which "Congress has not addressed the question of criminal intent" and those in which the Court is called upon to interpret the "import of what *it has said*." *X-Citement Video,* 513 U.S. at 81 (Scalia, J., dissenting) (emphasis added). It is unsurprising that the Court should act with restraint when implying into a statute elements that Congress did not include in the text. But the same respect for congressional prerogatives, founded on separation of powers concerns, rightly leads courts to construe *written*

mens rea elements broadly to avoid giving criminal statutes an unintended breadth. *See, e.g., Liparota*, 471 U.S. at 427.

The other cases the Government cites (U.S. Br. 39-42) are also inapt. Most, like *Carter*, involve statutes with no express mens rea element to interpret.[15] Those involving written mens rea elements are consistent with petitioner's rule of construction. Some apply the mens rea requirement to all the statute's elements.[16] Others involved a recognized exception to the general rule.[17] And some found that textual cues overcame the presumption and limited the scope of the intent element.[18]

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[15] *See United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978); *United States v. Feola*, 420 U.S. 671, 676-77 (1975); *United States v. Freed*, 401 U.S. 601, 607 (1971); *United States v. Balint*, 258 U.S. 250, 253 n.1 (1922).

[16] *See Liparota*, 471 U.S. at 433; *Morissette*, 342 U.S. at 270-71.

[17] Some of the cases involved "public welfare" offenses that dispense with traditional *mens rea* requirements. *See United States v. International Minerals & Chem. Corp*, 402 U.S. 558 (1971); *United States v. Freed*, 401 U.S. 601 (1971); *United States v. Balint*, 258 U.S. 250 (1922). *Cf. Liparota*, 471 U.S. at 432-33 (classifying these cases as "involving public welfare" offenses). Others involved jurisdictional elements. *See United States v. Yermian*, 468 U.S. 63, 68 (1984); *United States v. Feola*, 420 U.S. 671, 685 (1975).

[18] *See X-Citement Video*, 513 U.S. at 68 (finding that "knowingly" was not naturally read to extend to age of minority because that element was "set forth in independent clauses separated by interruptive punctuation," but ultimately relying on other considerations to overcome the natural reading of the text).

3. Nor does petitioner's position "risk disruption of a great deal of well-settled authority with respect to the construction of" federal drug statutes. U.S. Br. 46. Most of the provisions the Government cites (U.S. Br. 46-48) make plain on their face that the mens rea requirement of the underlying offense – codified in an entirely separate provision – does not apply to the aggravating facts identified in the penalty provision (*e.g.*, drug quantity, or activity within a school zone). *See supra* at 14. And while 21 U.S.C. § 861(a)(1) does include its own mens rea element, it is a statute "intended to protect a vulnerable class defined by age," thereby implicating special concerns that have led courts to narrowly construe mens rea requirements in similar exceptional contexts. *United States v. Chin*, 981 F.2d 1275, 1280 (D.C. Cir. 1992).

III. Petitioner's Reading Is Consistent With The Statute's Purposes.

The Government argues that construing the Aggravated Identity Theft statute in a traditional manner would be incompatible with the statute's core purpose of protecting potential victims from harm. U.S. Br. 19. It explains that Congress sometimes punishes defendants for the unintended consequences of their criminal acts, for example in cases of felony-murder or under statutes providing enhanced sentences for crimes committed near schools whether the defendant knows he is in a school zone or not. U.S. Br. 48. Congress would have intended the same kind of treatment here, the Government insists. This speculation is unfounded.

1. Petitioner does not disagree that Congress intended the Aggravated Identity Theft provision to protect potential victims from harm. But that does not distinguish this Act from most other criminal statutes, including other criminal theft statutes, which are also "victim-focused." And while it is presumably true that construing mens rea requirements narrowly would facilitate prosecutions, and therefore promote the purpose of protecting victims, this has not led the Court to generally construe the mens rea elements of criminal statutes narrowly. Indeed, the Court's general interpretative presumption, grounded in separation of powers concerns, is quite the opposite. *See, e.g., Liparota v. United States*, 471 U.S. 419, 427 (1985).

Thus, while victim protection is surely an important objective of the Aggravated Identity Theft provision, "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987). In the criminal context, Congress generally does *not* pursue its interest in protecting victims "at all costs." *Id.* To the contrary, our legal tradition overwhelmingly reserves criminal sanctions for cases in which victim harm is coupled with defendant culpability. *See, e.g.*, Prof. of Crim. Law Br. 3-10.[19] The Government has many tools for

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[19] The Government suggests that *United States v. Feola*, 420 U.S. 671 (1975), stands for the broad proposition that a mens rea element will be narrowly construed to provide "maximum protection" to those whom the statute is designed to shield. U.S. Br. 23 (quoting *Feola*, 420 U.S. at 684). But the

protecting its citizens, but it generally reserves criminal sanctions for those who act with full knowledge of the facts that make their conduct unlawful. *See, e.g.*, *Staples*, 511 U.S. at 605; *supra* § II.B.

2. To be sure, as the Government notes, criminal defendants sometimes commit more serious offenses than they intended, based on unexpected consequences of their acts, as in the case of felony-murder or vehicular manslaughter. U.S. Br. 48-49. But rather than being "routine," *id.* at 48, such laws constitute "notable exceptions to th[e] general rule that mental state as to one type of harm will not suffice for a crime involving another type of harm." LAFAVE, *supra*, § 6.3(d); *see also id.* § 6.3(e) (same where *degree* of harm is greater than intended). There is no indication that Congress would have thought identity theft should be included among the rare exceptions, which ordinarily involve very serious harm to the victim. *See id.* § 6.3(d) (noting that in most, "the unintended harm is the death of another"). Here, serious harm is not an element; indeed, Section 1028A(a)(1) does not require the Government to prove that that the defendant intended or inflicted

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case established no such principle. Instead, the Court simply held that when Congress provides protection *in a particular manner* – *i.e.*, by providing a federal forum for the criminal prosecution – then the Government need not prove the defendant's knowledge of a solely jurisdictional element of the crime. *See id.* at 685 ("The concept of criminal intent does not extend so far as to require that the actor understand not only the nature of his act but also its consequence for the choice of a judicial forum.").

any harm at all. Moreover, it would be surprising for Congress to write a felony-murder-like statute in language that appears, on its face, indistinguishable from an ordinary crime requiring the defendant's knowledge of all the elements of the offense.

It is also true that Congress sometimes will provide special sentencing enhancements for an ordinary crime, without requiring proof that the defendant was aware of the facts giving rise to the harsher punishment. U.S. Br. 46-47. But this is surely not such a provision. By its terms, Section 1028A creates a *separate criminal offense*, not a penalty enhancement for the predicate offense. And while sentencing enhancement provisions conspicuously *omit* any mens rea element, Section 1028A expressly *includes* one. *Compare* 21 U.S.C. § 860(a) *with* 18 U.S.C. § 1028A(a)(1).

3. In the end, the Government cannot persuasively claim that petitioner's interpretation would be so disruptive of Congress's victim-protection purposes as to warrant reading the statute contrary to the normal reading of the text and legal tradition. Petitioner's construction does not prevent punishment of the identity thieves Congress had foremost in mind in passing this statute. *See* Petr. Br. 20-21. Congress focused principally on individuals whose criminal aims (*e.g.*, access to financial accounts and credit) generally depend on the fact that a stolen identification belongs to a real person. *See, e.g.*, H.R. Rep. No. 108-528, at 4-6, 2004 U.S.C.C.A.N. 779, 780-82. These are the individuals

who pose the greatest risk of harm to victims.[20] And these are precisely the people whose conduct should easily provide convincing circumstantial evidence of their knowledge that the means of identification they steal and misuse belong to another. *See* Petr. Br. 33.

4. At the same time, the contrary rule advocated by the Government risks arbitrary results Congress could not have intended.

While Section 1028A(a)(1) never applies to someone who is wholly innocent, it nonetheless seeks to identify those who have engaged in culpable conduct above and beyond the acts constituting their predicate offense, acts that make them worthy of additional punishment as aggravated identity thieves. Yet, under the Government's view, the statute dispenses additional two-year sentences on the basis of a coin toss. For example, two brothers applying for work at the same facility, using false social security cards provided by the same counterfeiter, neither knowing whether the numbers

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[20] No doubt, the unknowing use of another person's means of identification may pose a risk of harm to the person whose identification is used. There is, however, every reason to believe that the risk of harm is smaller than that posed by the classic identity thief. *See* Petr. Br. 20-21. The Government suggests that this is not so, claiming that someone like petitioner could use a false social security number to open a credit card account, fail to pay the bill, and injure the credit of the person whose number he had unknowingly used. U.S. Br. 23-24. But the defendant's success in opening the account would provide powerful circumstantial evidence that he knew (by the time he completed a predicate offense) that the number was valid and belonged to another person.

belonged to someone else, could receive dramatically different punishments depending entirely on whether one of them received a number that had been issued to someone else. *See* MALDEF Br. 5.

At the same time, the brother who unknowingly received the identification number assigned to another person would receive exactly the same additional sentence under Section 1028A(a)(1) as a more culpable co-worker who intentionally stole someone's identity in order to empty the victim's bank account. The fact that Congress assigned a single harsh penalty for all convicted of Aggravated Identity Theft – with no opportunity for a court to adjust the sentence to take into account substantial disparities in culpability – is an additional reason to believe that Congress did not intend § 1028A(a)(1) to apply to both highly culpable traditional identity thieves and to less culpable individuals who unknowingly use another person's identification number.

Congress was aware that giving Section 1028A(a)(1) a focused application would not leave individuals like petitioner unpunished, or those injured by acts like his without a remedy. Petitioner is serving a long prison sentence for his admitted use of identification documents he knew to be false. In sentencing petitioner for that predicate offense, the district court was authorized to take account the risk of harm his use of those documents posed. And if that use had resulted in any actual injury, the court had the power to order restitution to the victims. *See* 18 U.S.C. § 3663(a)(1)(A) (authorizing restitution for any violation of Title 18); *see also Morissette v. United States*, 342 U.S. 246, 270 (1952) (noting availability of

civil relief for "unwitting acts," under which the "defendant's knowledge, intent, mistake, and good faith are generally irrelevant").

IV. At A Minimum, Section 1028A(a)(1) Is Ambiguous, Requiring Application Of The Rule of Lenity.

Even if the Court ultimately concludes that the language of Section 1028A(a)(1) does not unambiguously support petitioner's construction, the Court should at the very least acknowledge that the language does not unambiguously support the Government's construction either, thereby requiring application of the rule of lenity unless other indicia of intent resolve the ambiguity decisively in the Government's favor.

In *Liparota v. United States*, 471 U.S. 419 (1985), this Court described a similarly formulated provision as grammatically ambiguous. *Id.* at 424 & n.7. (citing W. LAFAVE & A. SCOTT, CRIMINAL LAW § 27 (1972)).[21] The Government asserts that "*Liparota*'s discussion of the scope of 'knowingly' should not be understood apart from the Court's primary stated concern [of] avoiding criminalization of otherwise non-culpable conduct." U.S. Br. 18 (citation omitted). But the Government makes no attempt to explain how the Court's policy concerns could affect its view of the clarity of the statutory language, much less

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[21] As petitioner has explained, the Court did not, however, doubt that the knowledge requirement in the statute in *Liparota* extended at least through the direct object phrase. *See* Petr. Br. 28-29; *supra* at 20.

how policy concerns would lead the Court to approvingly quote a treatise that generalized the observation far beyond the context of statutes risking criminalization of innocent conduct. Moreover, the Court is not alone in thinking that the scope of a knowledge requirement in similar statutes often gives rise to ambiguity. The American Law Institute drafted a specific rule in the Model Penal Code addressing the scope of mens rea elements precisely because its scholars and practitioners recognized that such ambiguities were "pervasive" in criminal statutes. *See* MODEL PENAL CODE § 2.02(4), Explanatory Note (1985).

Whatever the "trigger for the rule of lenity," U.S. Br. 49, it is satisfied in this case. While the Government hypothesizes policy reasons why Congress might wish to enact an identity theft statute with a narrow mens rea requirement, "it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text." *Crandon v. United States*, 494 U.S. 152, 160 (1990); *see also Hughey v. United States*, 495 U.S. 411, 422 (1990). "In these circumstances—where text, structure, and history fail to establish that the Government's position is unambiguously correct—[the Court] appl[ies] the rule of lenity and resolve the ambiguity in [the defendant's] favor." *United States v. Granderson*, 511 U.S. 39, 54 (1994). Thus, "[i]f Congress desires to go further, it must speak more clearly than it has." *McNally v. United States*, 483 U.S. 350, 360 (1987).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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APPENDIX

Appendix A

Collected Example Sentences From Petitioner's Briefs

From Brief For The Petitioner

(1) "Jane knowingly took that cat of Mr. Smith's."[22]

(2) "John knowingly discarded his sister's homework."[23]

(3) "Jane knowingly ate the last slice of pizza."[24]

(4) "John knowingly ate a bushel of his neighbor's apples."[25]

(5) "John knowingly ate a bushel of apples of his neighbor's."[26]

(6) "John knowingly discarded his sister's homework."[27]

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[22] Petr. Br. 6.

[23] Petr. Br. 9.

[24] Petr. Br. 9.

[25] Petr. Br. 10.

[26] Petr. Br. 10.

(7) "John discarded his sister's homework knowingly."[28]

From Reply Brief For The Petitioner

(8) "Susan knowingly transferred classified documents."[29]

(9) "Charles knowingly possessed a baggie of cocaine."[30]

(10) "Jane knowingly used her mother's computer."[31]

(11) "Jane knowingly used, without permission, her mother's computer."[32]

(12) "The food and drug agency and the Justice Department are conducting a criminal investigation into whether the Peanut

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[27] Petr. Br. 26 n.13.

[28] Petr. Br. 26 n.13.

[29] *Supra* at 3.

[30] *Supra* at 3.

[31] *Supra* at 3.

[32] *Supra* at 5 n.12, 9.

Corporation of America knowingly sold contaminated products."[33]

(13) "Now the process is repeating itself as Schapiro and other regulators begin to clean up after underwriters who knowingly peddled securities of questionable value . . . ."[34]

(14) "Officers . . . are investigating whether employees knowingly received stolen property."[35]

(15) "[The lawyer] . . . was under investigation on charges of knowingly misappropriating clients' funds."[36]

(16) "Bonds . . . denied knowingly using performance-enhancing drugs."[37]

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[33] *Supra* at 11 (citing Michael Falcone, *Peanut Supplier Banned From Federal Business*, N.Y. TIMES, Feb. 6, 2009).

[34] *Supra* at 11 (citing Steven Pearlstein, *Obama's SEC Pick Is No Joe Kennedy*, WASH. POST, Jan. 7, 2009).

[35] *Supra* at 11 (citing Maryland *Briefing: Delegate's Jewelry Shop Among 18 in Violation*, WASH. POST, Jan. 13, 2009).

[36] *Supra* at 11 (citing John Eligon, *Lawyer Is Accused of Stealing Disabled People's Assets He Was Assigned to Protect*, N.Y. TIMES, Jan. 29, 2009).

[37] *Supra* at 11 (citing Paul Elias, *Feds Press Harder on Bonds' Trainer; Agents Raid Home of Anderson's in-Law*, CHI. TRIB., Jan. 29, 2009).

(17) "Investors in private firms knowingly assume the risks associated with economic events that affect their companies, industries and the broader economy."[38]

(18) "Jane knowingly used, without permission, a toothbrush of another camper."[39]

(19) "Jane knowingly used, without permission, another camper's toothbrush."[40]

(20) "An Albuquerque lawmaker was criticized for 'grandstanding' Monday and knowingly subverting the rules of the House of Representatives."[41]

(21) "The General knowingly risked the lives of his soldiers to achieve an important objective."[42]

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[38] *Supra* at 11 (citing William Shughart, *Folly of Incentives*, Commentary, WASH. TIMES, Jan. 25, 2009).

[39] *Supra* at 13.

[40] *Supra* at 13.

[41] *Supra* at 13 (citing Dan Boyd, *Capitol Web Cast Ruffles Feathers: Lawmaker Chided for Broadcasting Legislative Committee Meeting*, ALBUQUERQUE J., Jan. 27, 2009).

[42] *Supra* at 13.

(22) "The author knowingly used the stories of everyday citizens in his article to make his abstract theory more concrete."[43]

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[43] *Supra* at 13.

Appendix B

18 U.S.C. § 1028(d)

18 U.S.C. § 1028. Fraud and related activity in connection with identification documents, authentication features, and information.

(d) In this section and section 1028A—

(1) the term "authentication feature" means any hologram, watermark, certification, symbol, code, image, sequence of numbers or letters, or other feature that either individually or in combination with another feature is used by the issuing authority on an identification document, document-making implement, or means of identification to determine if the document is counterfeit, altered, or otherwise falsified;

(2) the term "document-making implement" means any implement, impression, template, computer file, computer disc, electronic device, or computer hardware or software, that is specifically configured or primarily used for making an identification document, a false identification document, or another document-making implement;

(3) the term "identification document" means a document made or issued by or under the authority of the United States Government, a State, political

subdivision of a State, a sponsoring entity of an event designated as a special event of national significance, a foreign government, political subdivision of a foreign government, an international governmental or an international quasi-governmental organization which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals;

(4) the term "false identification document" means a document of a type intended or commonly accepted for the purposes of identification of individuals that—

(A) is not issued by or under the authority of a governmental entity or was issued under the authority of a governmental entity but was subsequently altered for purposes of deceit; and

(B) appears to be issued by or under the authority of the United States Government, a State, a political subdivision of a State, a sponsoring entity of an event designated by the President as a special event of national significance, a foreign government, a political subdivision of a foreign government, or an international governmental or quasi-governmental organization;

(5) the term "false authentication feature" means an authentication feature that—

(A) is genuine in origin, but, without the authorization of the issuing authority, has been tampered with or altered for purposes of deceit;

(B) is genuine, but has been distributed, or is intended for distribution, without the authorization of the issuing authority and not in connection with a lawfully made identification document, document-making implement, or means of identification to which such authentication feature is intended to be affixed or embedded by the respective issuing authority; or

(C) appears to be genuine, but is not;

(6) the term "issuing authority"—

(A) means any governmental entity or agency that is authorized to issue identification documents, means of identification, or authentication features; and

(B) includes the United States Government, a State, a political subdivision of a State, a sponsoring entity of an event designated by the President as a special event of national significance, a foreign government, a political subdivision of a foreign government, or an international government or quasi-governmental organization;

(7) the term "means of identification" means any name or number that may be used, alone or in

conjunction with any other information, to identify a specific individual, including any—

(A) name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;

(B) unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

(C) unique electronic identification number, address, or routing code; or

(D) telecommunication identifying information or access device (as defined in section 1029(e));

(8) the term "personal identification card" means an identification document issued by a State or local government solely for the purpose of identification;

(9) the term "produce" includes alter, authenticate, or assemble;

(10) the term "transfer" includes selecting an identification document, false identification document, or document-making implement and placing or directing the placement of such identification document, false identification document, or document-making implement on an online location where it is available to others;

(11) the term "State" includes any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any other commonwealth, possession, or territory of the United States; and

(12) the term "traffic" means--

(A) to transport, transfer, or otherwise dispose of, to another, as consideration for anything of value; or

(B) to make or obtain control of with intent to so transport, transfer, or otherwise dispose of.

Appendix C

18 U.S.C. § 2252(a)

18 U.S.C. § 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who—

(1) knowingly transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

Appendix D

21 U.S.C. § 841(a)-(b)(1)(A)

21 U.S.C. § 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury

results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this

subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

Appendix E

21 U.S.C. § 860(a)

21 U.S.C. § 860. Distribution or manufacturing in or near schools and colleges

(a) Penalty

Any person who violates section 841(a)(1) of this title or section 856 of this title by distributing, possessing with intent to distribute, or manufacturing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility, is (except as provided in subsection (b) of this section) subject to (1) twice the maximum punishment authorized by section 841(b) of this title; and (2) at least twice any term of supervised release authorized by section 841(b) of this title for a first offense. A fine up to twice that authorized by section 841(b) of this title may be imposed in addition to any term of imprisonment authorized by this subsection. Except to the extent a greater minimum sentence is otherwise provided by section 841(b) of this title, a person shall be sentenced under this subsection to a term of imprisonment of not less than one year. The mandatory minimum sentencing provisions of this

paragraph shall not apply to offenses involving 5 grams or less of marihuana.

Appendix F

18 U.S.C. § 1546(a)

18 U.S.C. § 1546. Fraud and misuse of visas, permits, and other documents

(a) Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or

Whoever, except under direction of the Attorney General or the Commissioner of the Immigration and Naturalization Service, or other proper officer, knowingly possesses any blank permit, or engraves, sells, brings into the United States, or has in his control or possession any plate in the likeness of a plate designed for the printing of permits, or makes any print, photograph, or impression in the likeness

of any immigrant or nonimmigrant visa, permit or other document required for entry into the United States, or has in his possession a distinctive paper which has been adopted by the Attorney General or the Commissioner of the Immigration and Naturalization Service for the printing of such visas, permits, or documents; or

Whoever, when applying for an immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or for admission to the United States personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name without disclosing his true identity, or sells or otherwise disposes of, or offers to sell or otherwise dispose of, or utters, such visa, permit, or other document, to any person not authorized by law to receive such document; or

Whoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact—

Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929(a) of this title)), 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.

Appendix G

18 U.S.C. § 922(q)(2)(a)

18 U.S.C. § (q)(2)(A) It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.

Appendix H

18 U.S.C. § 1040(a)

18 U.S.C. § 1040. Fraud in connection with major disaster or emergency benefits

(a) whoever, in a circumstance described in subsection (b) of this section, knowingly—

> (1) falsifies, conceals, or covers up by any trick, scheme, or device any material fact; or
>
> (2) makes any materially false, fictitious, or fraudulent statement or representation, or makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or representation,

in any matter involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with a major disaster declaration under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170) or an emergency declaration under section 501 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5191), or in connection with any procurement of property or services related to any emergency or major disaster declaration as a prime contractor with the United States or as a subcontractor or supplier on a contract in which there is a prime contract with the United

States, shall be fined under this title, imprisoned not more than 30 years, or both.

AMICUS CURIAE BRIEF

114

No. 06-108

Supreme Court, U.S.
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In The
Supreme Court of the United States

IGNACIO FLORES-FIGUEROA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICI CURIAE* ADVOCATES FOR HUMAN RIGHTS, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, ASIAN LAW CAUCUS, ASISTA, CATHOLIC LEGAL IMMIGRATION NETWORK, INC., DECORAH AREA FAITH COALITION, FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT, FLORIDA IMMIGRANT ADVOCACY CENTER, IMMIGRANT DEFENSE PROJECT OF THE NEW YORK STATE DEFENDERS ASSOCIATION, IMMIGRANT LAW CENTER OF MINNESOTA, LATINOJUSTICE PRLDEF, LUTHER COLLEGE OFFICE FOR COLLEGE MINISTRIES, NATIONAL IMMIGRANT JUSTICE CENTER, NATIONAL IMMIGRATION LAW CENTER, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, INC., NORTH CAROLINA JUSTICE CENTER, POLITICAL ASYLUM/IMMIGRATION REPRESENTATION PROJECT, POSTVILLE RELIEF EFFORT BASED OUT OF ST. BRIDGET'S CATHOLIC CHURCH HISPANIC MINISTRY, AND WASHINGTON DEFENDER ASSOCIATION IMMIGRATION PROJECT IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

BACKGROUND 4

THE WORKPLACE IMMIGRATION RAID IN POSTVILLE, IOWA, SHOWED HOW AN OVERBROAD INTERPRETATION OF 18 U.S.C. § 1028A OPERATES IN PRACTICE 4

ARGUMENT 9

I. POSTVILLE DEMONSTRATED HOW FAILING TO REQUIRE KNOWLEDGE OF THE DEFINING ELEMENT OF 18 U.S.C. § 1028A DESTROYS THE LINK BETWEEN PUNISHMENT AND CULPABILITY 9

A. Evidence Shows that Large Numbers of Agriprocessors Workers Did Not Know That They Were Using Another Person's Identity Information 10

B. In Postville, Punishment Turned Upon a Factor Beyond a Defendant's Control, Namely, Whether a Number Happened to be Real or Fake 14

TABLE OF CONTENTS – Continued

Page

C. The Erroneous Interpretation of 18 U.S.C. § 1028A Resulted in No Differentiation Between Immigrants Using False Identification for Employment Purposes and People Who Have Truly Committed Identity Theft 16

D. These Arbitrary Results are Unnecessary Because Congress Already Provides Independent And Flexible Punishment for the Knowing Possession and Use of False Documents 18

II. A ONE-SIZE-FITS-ALL APPROACH TO PUNISHMENT BASED ON THE EIGHTH CIRCUIT'S READING OF 18 U.S.C. § 1028A FRUSTRATES CONGRESS'S STANDARD TREATMENT OF IMMIGRATION CONSEQUENCES OF FALSE DOCUMENT OFFENSES 21

A. Congress's Immigration Regime Employs a Complex Classification System that Distinguishes Between Different Kinds of Document Offenses 22

B. Congress's Immigration Regime Creates Paths to Relief from Removal that Consider Both the Classification of Offenses and Individual Equities 25

TABLE OF CONTENTS – Continued

Page

C. Congress Could Not Plausibly Have Intended a One-Size-Fits-All Approach to 18 U.S.C. § 1028A Given Its Careful Consideration to the Same Matters in its Immigration Regime 30

CONCLUSION 32

TABLE OF AUTHORITIES

Page

CASES

Beltran-Tirado v. INS, 213 F.3d 1179 (9th Cir. 2000) 24

Dada v. Mukasey, 128 S. Ct. 2307 (2008) 29

Hyder v. Keisler, 506 F.3d 388 (5th Cir. 2007) 24

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United States v. Mendoza-Gonzalez, 520 F.3d 912 (8th Cir. 2008) 4, 5, 7

United States v. Villanueva-Sotelo, 515 F.3d 1234 (D.C. Cir. 2008) 14, 16

STATUTES AND REGULATIONS

8 U.S.C. § 1101(a)(15)(U)(i)-(iii) 27

8 U.S.C. § 1101(a)(43) 23, 24, 25

8 U.S.C. § 1158(b) 28

8 U.S.C. § 1182(a)(2)(A)(i)(I) 23

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TABLE OF AUTHORITIES – Continued

Page

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8 U.S.C. § 1182(i) 30

8 U.S.C. § 1227(a)(2)(A) 23

8 U.S.C. § 1229b(b)(1) 26

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8 U.S.C. § 1255 ..... 27, 30

8 U.S.C. § 1255(m)(1) 27

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18 U.S.C. § 1028A ..... *passim*

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OTHER AUTHORITIES

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TABLE OF AUTHORITIES – Continued

Page

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Information for Angela Noemi Lastor-Gomez, *United States v. Lastor-Gomez*, No. 08-1141 (N.D. Iowa May 19, 2008) 15

Tony Leys, *World Notes Postville Suffering, Nobel Winner Tells Immigrants*, DES MOINES REGISTER, Nov. 9, 2008, at 1B 12, 13

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Peter Moyers, *Butchering Statutes: The Postville Raid and the Misinterpretation of Federal Law*, 32 SEATTLE UNIV. L. REV. (forthcoming Apr. 2009), *available at* http://ssrn.com/abstract=1306747 ..... 7, 11, 15, 20

TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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INTERESTS OF *AMICI CURIAE*[1]

Amici are organizations whose members, constituents, and clients are facing the real-world consequences of stretching the crime of aggravated identity theft to reach immigrant workers using false identification for employment purposes without knowledge that the identification belonged to another person. We are concerned that the crime of aggravated identity theft has been transformed, contrary to congressional intent, from an additional two-year sentence for people who knowingly use others' identities to steal money and otherwise cause harm into an inflexible instrument that targets immigrant workers and ignores established distinctions about culpability, harm, and equities.

Amici Decorah Area Faith Coalition, Luther College Office for College Ministries, and the Postville Relief Effort based out of St. Bridget's Catholic Church Hispanic Ministry have seen the consequences of an overbroad reading of 18 U.S.C. § 1028A firsthand. These local faith-based groups coordinated relief efforts following the workplace raid in Postville, Iowa, and provided direct services to immigrants

[1] *Amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Both petitioner and respondent have consented to the filing of this brief. Pursuant to Rule 37.3(a), *amici curiae* have filed the letters of consent with the Clerk of the Court.

impacted by the unbridled application of aggravated identity theft charges.

Amici Advocates for Human Rights, American Immigration Lawyers Association, Asian American Legal Defense and Education Fund, Asian Law Caucus, ASISTA, Catholic Legal Immigration Network, Inc., Florence Immigrant and Refugee Rights Project, Florida Immigrant Advocacy Center, Immigrant Defense Project of the New York State Defenders Association, Immigrant Law Center of Minnesota, LatinoJustice PRLDEF, National Immigrant Justice Center, National Immigration Law Center, National Immigration Project of the National Lawyers Guild, Inc., North Carolina Justice Center, Political Asylum/Immigration Representation Project, and Washington Defender Association Immigration Project are local and national organizations that engage in advocacy, direct services, education, outreach, and impact litigation to protect the civil rights of immigrants. These groups have met with and counseled immigrants following workplace raids, provided legal services for the families and communities adversely impacted, and observed the threat to their members, constituents, and clients.

We are all concerned that Respondent's expansion of aggravated identity theft perverts congressional intent in the realms of both criminal and immigration law. Not only has the Respondent's reading resulted in the incarceration of immigrants who are not actually guilty of committing aggravated identity theft, it has in practice closed the door to

immigrants' legitimate claims to relief from removal under the immigration law. But for the Respondent's misreading of 18 U.S.C. § 1028A, some of our clients, members, and constituents might have successfully obtained lawful status in the United States.

♦

SUMMARY OF ARGUMENT

The workplace immigration raid conducted by the Department of Homeland Security's Immigration and Customs Enforcement (ICE) at the Agriprocessors meatpacking plant in Postville, Iowa, demonstrated the practical effects of failing to require knowledge of the defining element of 18 U.S.C. § 1028A – whether the identification at issue is "of another person." In Postville, the crime of aggravated identity theft, which carries a two-year mandatory sentence on top of punishment for underlying crimes, was stretched to reach immigrant workers with low levels of culpability. The Eighth Circuit's reading produced arbitrary results. These arbitrary results were not necessary, as Congress's false document scheme provides for independent and flexible punishment when immigrants knowingly use false documents. By extending the charge of aggravated identity theft beyond its intended bounds, the Eighth Circuit's reading of 18 U.S.C. § 1028A contravened the bedrock criminal law principle that punishment should be calibrated to culpability.

Respondent's interpretation of 18 U.S.C. § 1028A has widespread practical implications for many immigrant workers. The one-size-fits-all approach to punishment based on the Eighth Circuit's reading of 18 U.S.C. § 1028A circumvents the way in which immigration law traditionally treats an immigrant's crime, culpability, and equities. Congress designed the immigration regime to balance an immigrant's equities with previous wrongdoing. An overbroad reading of the aggravated identity theft statute sidesteps Congress's immigration regime and prevents immigrant defendants from seeking relief otherwise available.

The Court should therefore limit its interpretation of the knowledge requirement in 18 U.S.C. § 1028A to reinforce the link between culpability and punishment.

♦

BACKGROUND

THE WORKPLACE IMMIGRATION RAID IN POSTVILLE, IOWA, SHOWED HOW AN OVERBROAD INTERPRETATION OF 18 U.S.C. § 1028A OPERATES IN PRACTICE

On March 28, 2008, in *United States v. Mendoza-Gonzalez*, the Eighth Circuit decided that a defendant need not know that the identification he was using belonged to another person to be convicted of the

crime of aggravated identity theft under 18 U.S.C. § 1028A(a)(1).[2] Less than two months later, in Postville, Iowa, the Department of Homeland Security's Immigration and Customs Enforcement (ICE) premised the largest single-site workplace immigration raid in U.S. history[3] upon criminal charges relying on the Eighth Circuit's newly minted interpretation.

The unprecedented, widespread application of the aggravated identity theft statute in Postville presents a compelling case study of what occurs when courts do not require that a guilty mind correspond to key elements of serious crimes. In Postville, the plea arrangement reached with hundreds of immigrant workers exemplifies the consequences of such a reading.

On May 12, 2008, 900 ICE agents arrested 389 immigrant workers at the Agriprocessors kosher meatpacking plant in Postville, Iowa, for using Social Security or alien registration numbers that did not

[2] *United States v. Mendoza-Gonzalez*, 520 F.3d 912 (8th Cir. 2008) *petition for cert. filed* (U.S. July 15, 2008) (No. 08-5316).

[3] *See* Julia Preston, *270 Illegal Immigrants Sent to Prison in Federal Push*, N.Y. TIMES, May 24, 2008, at A1. Since the Postville raid, ICE conducted a raid resulting in an even greater number of immigration detentions in a circuit that has not issued a ruling on 18 U.S.C. § 1028A's knowledge requirement. Postville remains record-breaking in terms of the number of immigrants charged with criminal offenses. Adam Nossiter, *Nearly 600 Were Arrested in Factory Raid, Officials Say*, N.Y. TIMES, Aug. 27, 2008, at A16.

belong to them.[4] Most of the workers arrested were undocumented immigrants from Guatemala and Mexico.[5] The typical Agriprocessors worker purchased false documents to obtain employment, often at the suggestion of Agriprocessors management.[6] The principal charge brought against 270 of these workers was not just ordinary document *fraud* – an offense for which both civil and criminal sanctions have long existed – but rather the extraordinary charge of aggravated identity *theft*.[7] All 270 of the workers who were charged with aggravated identity theft pled guilty to lesser false document charges and received sentences ranging from five months to a year and one day.[8]

The distinguishing characteristics of aggravated identity theft profoundly influenced the sequence of events in the Postville raid. Ordinary document crimes, such as unlawful use of a Social Security number (42 U.S.C. § 408(a)) and possession or use of

[4] Spencer Hsu, *Immigration Raid Jars a Small Town*, WASHINGTON POST, May 18, 2008, at A01.

[5] Of the 389 Agriprocessors employees arrested, 290 were from Guatemala, 93 from Mexico, four from Ukraine, and two from Israel. *Id.*

[6] Second Superseding Indictment at 1, United States v. Agriprocessors, Inc., No. CR-08-1324 (N.D. Iowa Nov. 20, 2008); NATIONAL IMMIGRANT JUSTICE CENTER, DEFENDING HUMAN RIGHTS & DUE PROCESS 3 (2009) [hereinafter *NIJC Report*], *available at* http://www.immigrantjustice.org/resources/policy/nijcpolicybrief.

[7] *See* Preston, *supra* note 3.

[8] *Id.*

a false identification document (18 U.S.C. § 1546(a)), carry flexible sentences with no mandatory minimum; these charges result in a baseline sentence of zero to six months imprisonment for first-time offenders under the Sentencing Guidelines.[9] In contrast, aggravated identity theft carries a mandatory two-year sentence that must be served on top of sentences for underlying crimes.[10] Charging the workers with aggravated identity theft on top of ordinary document crimes thus anchored negotiations at a much higher baseline of punishment than would have resulted from charges for ordinary false document offenses alone.

Aggravated identity theft is distinct from ordinary document crimes primarily in that 18 U.S.C. § 1028A(a)(1) requires that the identification at issue is "of another person."[11] In *Mendoza-Gonzalez,* the Eighth Circuit established that the government need not consider whether the defendant had a guilty mind with respect to this defining element.[12] Under the

[9] Peter Moyers, *Butchering Statutes: The Postville Raid and the Misinterpretation of Federal Law*, 32 SEATTLE UNIV. L. REV. (forthcoming Apr. 2009), *available at* http://ssrn.com/abstract=1306747.

[10] 18 U.S.C. § 1028A(a)-(b) (2006).

[11] In contrast with 18 U.S.C. § 1028A(a)(1), false document charges such as 42 U.S.C. § 408(a)(7) and 18 U.S.C. § 1546 simply require falsity.

[12] *United States v. Mendoza-Gonzalez*, 520 F.3d 912, 915 (8th Cir. 2008), *petition for cert. filed* (U.S. July 15, 2008) (No. 08-5316).

Eighth Circuit's sweeping reading, the risk of conviction was high and the length of punishment was certain for many Postville workers, making giving up their right to trial and pleading guilty much more compelling.

The reality of the cases processed in Postville contradicts the claim that the immigrant workers possessed the knowledge that identity theft requires. In Postville, only one out of 983 Social Security Numbers from Agriprocessors' "no match" letters in 2007 corresponded to a reported case of a stolen identity.[13]

The Eighth Circuit's interpretation, the statute's rigid potential sentence, and the reality of detention in anticipation of trial set the stage for a large number of convictions with sentences of imprisonment and judicial orders of deportation that circumvented immigration remedies. The standard plea arrangement for those charged with aggravated identity theft consisted of a five-month sentence pursuant to a guilty plea to 18 U.S.C. § 1546(a), three years of supervised release, and a stipulated judicial removal

[13] Moyers, *supra* note 9, at 11 (citing *In re John Doe et al.*, case no. 08-MJ-110-JSS, docket no. 1-3 (N.D. Iowa May 9, 2008) at ¶ 89). The Internal Revenue Service annually sends employers "no-match" letters identifying any employees whose combination of name and number do not correspond to the information on file with the agency. Social Security Administration – Overview of Social Security Employer No-Match Letters Process, http://www.ssa.gov/legislation/nomatch2.htm (last visited December 11, 2008).

order that waived all rights to individualized immigration proceedings and consideration of forms of relief.[14]

♦

ARGUMENT

I. POSTVILLE DEMONSTRATED HOW FAILING TO REQUIRE KNOWLEDGE OF A DEFINING ELEMENT OF 18 U.S.C. § 1028A DESTROYS THE LINK BETWEEN PUNISHMENT AND CULPABILITY

Following the ICE raid in Postville, Iowa, individuals with the same culpability received different sentences based solely on whether the Social Security or alien registration numbers they used belonged to a real person. Conversely, individuals using false Social Security or alien registration numbers for employment purposes were charged with the same crime of aggravated identity theft as those who truly committed identity theft, despite a lesser degree of culpability. These incongruous practical results – which Congress could not have intended – counsel for an interpretation of 18 U.S.C. § 1028A that preserves the critical connection between individual culpability and punishment.

[14] *See, e.g.*, Plea Agreement for Thelma Zamol-Yool at 2-4, *United States v. Zamol-Yool*, No. 08-1306 (N.D. Iowa May 18, 2008).

A. Evidence Shows that Large Numbers of Agriprocessors Workers Did Not Know That They Were Using Another Person's Identity Information

The knowledge that most Agriprocessors workers possessed was not sufficient to satisfy the element that distinguishes aggravated identity theft from ordinary false document crimes. Immigrant workers arrested in the Postville raid had varying levels of sophistication and awareness about the Social Security system.[15] Despite their differences, most were similarly situated with respect to the legal question at issue: Evidence shows that large numbers of immigrant workers arrested did not know that the Social Security or alien registration number they had submitted to their employer belonged to another person.

In many cases, immigrant workers in Postville who were using false documents did not even know the significance of a Social Security or alien registration number. About three-quarters of the 389 workers arrested were Guatemalan; many of indigenous descent.[16] Many could not read or write and had an

[15] *NIJC Report*, *supra* note 6, at 1-3.

[16] Hsu, *supra* note 4; *Immigration Raids: Postville and Beyond: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 6 (2008) (statement of Dr. Erik Camayd-Freixas, Professor of Modern Languages, Florida International University) [hereinafter Camayd-Freixas] *available at* http://judiciary.house.gov/hearings/pdf/Camayd-Freixas080724.pdf; David Bacon, *Railroading Immigrants*, THE NATION, Oct. 6, 2008, at 20, 21.

elementary school education or less.[17] For some, working at Agriprocessors was their first experience with the formalities of employment in the United States.[18] Interpreter Dr. Erik Camayd-Freixas indicated that over half (five of nine) of the immigrants for whom he translated did not know what a Social Security or alien registration number was when questioned by their attorney.[19] Attorney Sonia Parras Konrad reported that some of her clients not only did not know what a Social Security number was, they mistakenly believed that they were legally present in the United States.[20]

Other immigrant workers arrested in the Postville raid knew that they were using false documents, but did not know that the ID belonged to someone else. News reports of the Postville raid repeatedly cited workers who disclaimed any knowledge that the numbers they had submitted to Agriprocessors belonged to other people.

[17] Moyers, *supra* note 9, at 28 (citing interview with Alfred Willett, CJA Panel Defense Attorney); Camayd-Freixas, *supra* note 16, at 2. A large number of the indigenous Guatemalans did not speak much English or Spanish. Bacon, *supra* note 16, at 21.

[18] *See* Camayd-Freixas, *supra* note 16, at 10.

[19] *NIJC Report*, *supra* note 6, at 1.

[20] Parras Konrad reported that two of her clients were escorted across the border by coyotes, who told them that government-issued papers demanding their appearance at an immigration hearing were "permisos" or work-authorization documents. Unable to read the documents, the women believed that the papers authorized a temporary stay. *Id.* at 3.

- A mother of four from Mexico, worked at Agriprocessors for three years before her arrest. CNN reported: "She says she was given a 'Social Security number that they [Agriprocessors] invented for me.' Asked who made it, [she] says, 'I don't know. I never knew.'"[21]

- After attending a support group meeting of immigrant women in Postville, Monica Rohr of the Associated Press recounted: "All speak of the same concerns. . . . They do not understand why federal officials are pressing criminal identity theft charges against many of the detained immigrants, who say they did not know they were buying stolen information."[22]

- Nobel Peace Prize-winner Rigoberta Menchu visited St. Bridget's Church in Postville, which ministered to immigrant families impacted by the raid. Tony Leys of the *Des Moines Register* wrote: "[Menchu] heard a woman in the audience decry the fact that hundreds of workers were imprisoned for five months on charges of identity theft. The woman said the immigrants did not know the false papers they bought contained Social

[21] Wayne Drash, *Priest: 'Nobody Can Tell Me to Shut Up'*, CNN.COM, Oct. 16, 2008, http://edition.cnn.com/2008/US/10/15/postville.priest/index.html.

[22] Monica Rhor, *A Small Town Struggles after Immigration Raid*, USATODAY.COM, Aug. 16, 2008, http://www.usatoday.com/money/economy/2008-08-16-1697371147_x.htm.

> Security numbers that actually belonged to other people."[23]

A recent article examining the legal basis for the Postville raid cites interviews with criminal defense attorneys that corroborate the workers' accounts.[24]

Charges brought against Agriprocessors managers after the raid support employees' claims that they were unaware of the origin of the Social Security or alien registration numbers. As of November 20, 2008, five Agriprocessors managers had been indicted for, *inter alia*, conspiracy to commit document fraud, aiding and abetting document fraud, and six counts of aiding and abetting aggravated identity theft.[25] The defendants allegedly directed employees to procure false documents and loaned employees money to purchase new documents.[26] Agriprocessors management allegedly even bought documents directly from counterfeiters and then charged employees for the cost.[27] Counsel for detainees arrested in Postville also alleged in civil proceedings that Agriprocessors played a significant role in procuring false documents

[23] Tony Leys, *World Notes Postville Suffering, Nobel Winner Tells Immigrants*, DES MOINES REGISTER, Nov. 9, 2008, at 1B.

[24] Moyers, *supra* note 9, at 33.

[25] Second Superseding Indictment at 1, *United States v. Agriprocessors, Inc.*, No. CR-08-1324 (N.D. Iowa Nov. 20, 2008).

[26] *Id.* at 4-8.

[27] *Id.*

for employees.[28] The active role of these intermediaries, if proven true, makes an inference that all of the workers knew the nature and origins of the numbers they were using even less plausible.

B. In Postville, Punishment Turned Upon a Factor Beyond a Defendant's Control, Namely, Whether a Number Happened to be Real or Fake

The punishment meted out in Postville did not correspond to immigrant workers' culpability, but rather the arbitrary fact of whether the Social Security number they utilized actually corresponded to a real person.[29] The majority of the approximately 300 employees who faced criminal charges were initially charged with aggravated identity theft for using documents that contained real Social Security or alien registration numbers.[30] The remaining workers who were using unassigned numbers could not plausibly be charged with aggravated identity theft, even under the Eighth Circuit's expansive reading.

[28] Trish Mehaffey, *Postville Immigrants File Suit, Claim Abuse*, CEDAR RAPIDS GAZETTE ONLINE, May 15, 2008, *available at* http://www.gazetteonline.com/apps/pbcs.dll/article?AID=/20080515/NEWS/949618896/1006/news.

[29] Judge Friedman at the District Court for the District of Columbia underscored the arbitrary nature of the government's reading during oral argument in *United States v. Villanueva-Sotelo*. *United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1237 (D.C. Cir. 2008) (citing Hr'g Tr. at 15 (Apr. 4, 2007)).

[30] *See* Preston, *supra* note 3.

The immigrant workers fortunate enough not to be swept into the Eighth Circuit's misreading of 18 U.S.C. § 1028A were instead charged with either 18 U.S.C. § 1546(a) or other ordinary false document offenses with flexible sentencing regimes and no mandatory minimum sentence.[31] Prosecutors typically offered those charged with 18 U.S.C. § 1546(a) five years of probation, in contrast to the five-month prison sentence offered to those whose numbers happened to be assigned to another person.[32] Presumably, prosecutors recognized the probability that a judge would sentence a first-time offender using a number for employment purposes to a term of imprisonment, if not probation, substantially shorter than the two-year mandatory minimum dictated by 18 U.S.C. § 1028A based on such a person's culpability.

[31] *See, e.g.*, Information for Angela Noemi Lastor-Gomez, *United States v. Lastor-Gomez*, No. 08-1141 (N.D. Iowa May 19, 2008); Moyers *supra* note 9, at 25.

[32] *See, e.g.*, Plea Agreement for Angela Noemi Lastor-Gomez, *United States v. Lastor-Gomez*, No. 08-1131 (N.D. Iowa May 13, 2008).

C. The Erroneous Interpretation of 18 U.S.C. § 1028a Resulted in No Differentiation Between Immigrants Using False Identification for Employment Purposes and People Who Have Truly Committed Identity Theft

According to the government's interpretation, 18 U.S.C. § 1028A mandates the same two-year minimum sentence for both someone who *knowingly* used another's identity and an undocumented immigrant using a false document for employment *without knowledge* that it belonged to someone else. Congress could not have intended to impose the same mandatory scheme on defendants with such differing levels of culpability.

Legislative history reveals that Congress designed 18 U.S.C. § 1028A to target people who knowingly used the identity of another in the commission of predicate crimes. The D.C. Circuit in *U.S. v. Villanueva-Sotelo* found that the legislative history contained not a single example in which a defendant would be guilty of aggravated identity theft without knowing that the identification belonged to another person.[33] Examples abounded, however, of people with knowledge: people who stole credit card and other data from their place of employment, which was then used to create false identification cards;[34] imposters

[33] 515 F.3d at 1245.

[34] H.R. Rep. No. 108-528, at 5 (2004), *reprinted in* 2004 U.S.C.C.A.N. 779, 781.

who assumed the identities of others to obtain loans and lines of credit;[35] and people who used the information of acquaintances to obtain government benefits.[36]

The facts surrounding the workers charged with aggravated identity theft in Postville contrast sharply with those of genuine identity thieves. In Postville, there was no reasonable inference that many workers knew that the identification they were using belonged to another person. In contrast, in other prosecutions, one could easily infer knowledge from the facts of the case. For example, a couple in their early twenties pled guilty to multiple counts of aggravated identity theft after stealing the identities of about 50 friends and neighbors and using their identities to travel lavishly. The total bill for their escapades reached $116,000.[37] Similarly, a California man who operated several tax preparation businesses pled guilty to aggravated identity theft after stealing the identity of one of his clients and assuming it to file a fraudulent tax return.[38] In both of these classic identity theft

[35] H.R. Rep. No. 108-528, at 6 (2004), *reprinted in* 2004 U.S.C.C.A.N. 779, 782.

[36] *Id.*

[37] Joseph A. Slobodzian, *Ex-Penn Student Sentenced in "Bonnie and Clyde" Identity-Theft Swindles*, PHILADELPHIA INQUIRER, Nov. 15, 2008, at A01.

[38] Press Release, United States Attorney's Office for the Central District of California, *Tax Preparer Guilty in Several Fraudulent Schemes, Including Identity Theft, that Led to*

(Continued on following page)

scenarios, the defendants clearly knew that they were abusing the identity of another person.

D. These Arbitrary Results are Unnecessary Because Congress Already Provides Independent And Flexible Punishment for the Knowing Possession and Use of False Documents

The arbitrary results that follow from an overly broad reading of 18 U.S.C. § 1028A are not necessary. Congress already provides for significant civil and criminal sanctions for knowing possession and use of false documents. The question before the court is simply whether it is appropriate to stretch aggravated identity theft's two-year mandatory sentence to reach immigrant workers' use of false documents when they do not know that the documents belonged to another person.

The knowledge of falsity that some Agriprocessors workers possessed could have been adequate for the government to prove violations of ordinary false document offenses. The Immigration and Nationality Act imposes civil penalties for knowingly making, using, possessing, or obtaining a false document for the purpose of satisfying any requirement under the immigration law.[39] In addition, 42 U.S.C.

Millions in Losses (Mar. 24, 2008), *available at* http://www.usdoj.gov/usao/cac/pressroom/pr2008/031.html.

[39] 8 U.S.C. § 1324c(a) (2006).

§ 408(a)(7)(B) criminalizes the unlawful use of a Social Security number and 18 U.S.C. § 1546 criminalizes the possession or use of a false identification document. Neither of the criminal offenses requires that a number or document belong to another person.

- 18 U.S.C. § 1546(a) requires that the accused know the document at issue "to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false statement, or to have been otherwise procured by fraud or unlawfully obtained."
- 18 U.S.C. § 1546(b) requires knowledge "that the document was not issued lawfully for the use of the possessor" or "that the document is false."
- 42 U.S.C. § 408(a)(7)(B) requires that the accused, "with intent to deceive, falsely represents a number" when in fact it does not belong to him.

These ordinary false document charges are more flexible than aggravated identity theft. Both 42 U.S.C. § 408(a)(7)(B) and 18 U.S.C. § 1546 allow for flexibility in sentencing, so that individuals will be punished according to their levels of culpability. For example, the Sentencing Guidelines recommend that a defendant with no criminal history and no prior orders of removal should receive a sentence between zero and six months for a charge under

either statute.[40] In contrast, aggravated identity theft's two-year mandatory minimum sentence cannot be adjusted to reflect individual circumstances.

While more flexible than aggravated identity theft, ordinary false document charges can be serious when the facts warrant significant punishment. Both 42 U.S.C. § 408(a)(7)(B) and 18 U.S.C. § 1546(b) carry a maximum sentence of five years. Depending on the circumstances of the crime, 18 U.S.C. § 1546(a) specifies a maximum sentence of 10-25 years. These serious yet more flexible charges allow the punishment to correspond to culpability. For example, some convicted under 42 U.S.C. § 408(a)(7)(B) would face a longer sentence under the Sentencing Guidelines for factors such as using a Social Security number to open and charge large amounts to credit cards.[41]

[40] Moyers, *supra* note 9, at 26 ("The Sentencing Guidelines provide that a violation of 42 U.S.C. § 408(a) is governed by USSG § 2B1.1 and that a violation of 18 U.S.C. § 1546(a) is governed by USSG § 2L2.2. U.S. SENTENCING GUIDELINES appx. A (2007). The base offense level under USSG § 2B1.1 for a violation of § 408(a) is six. USSG § 2B1.1. . . . The base offense level under USSG § 2L2.1 for a violation of § 1546(a), if not made for profit, is eight. USSG § 2L2.1(a)-(b).").

[41] Loss to the victim can result in increasing additions to the base offense level corresponding to the amount of the loss. For example, using a false Social Security number to obtain credit cards and charge more than $30,000 to them merits a six-level increase from the base offense set in the Sentencing Guidelines. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1)(D) (2008).

II. A ONE-SIZE-FITS-ALL APPROACH TO PUNISHMENT BASED ON THE EIGHTH CIRCUIT'S READING OF 18 U.S.C. § 1028A FRUSTRATES CONGRESS'S STANDARD TREATMENT OF IMMIGRATION CONSEQUENCES OF FALSE DOCUMENT OFFENSES

The Court should discern Congress's intent vis-à-vis 18 U.S.C. § 1028A in light of its overarching approach to false document offenses in the immigration law. A one-size-fits-all approach to punishment for workers whose false documents happen to correspond to a real person conflicts with Congress's immigration regime for evaluating the appropriate consequences for false document offenses. Congress's immigration regime recognizes that every immigrant who is removable should not necessarily be removed. The immigration laws are therefore nuanced to strike a balance between an individual's equities and prior transgressions. An overbroad reading of 18 U.S.C. § 1028A frustrates this scheme by leveraging judicial removal orders that completely bypass the immigration regime.

Broadly speaking, whether an individual immigrant will actually be removed is a three-step process. First, an immigration judge must determine whether an immigrant is removable. Second, the judge must determine whether the immigrant is statutorily eligible for various forms of relief. Third, if eligible, the judge must determine whether the individual

applying for relief merits a favorable exercise of discretion.

The usual methodology employed in immigration proceedings contrasts sharply with the one-size-fits-all approach that follows from the Eighth Circuit's reading of 18 U.S.C. § 1028A. As was illustrated in Postville, such a reading completely evades immigration distinctions and serves as a predicate to judicial deportation orders that ignore distinctions among workers and preclude consideration for all forms of relief.

The immigration system treats false document offenses seriously, but it distinguishes between offenses both in determining removability and eligibility for appropriate relief. Under the standard immigration methodology, an immigration judge would still have asked whether an immigrant convicted of a false document offense was statutorily eligible for relief and whether she merited a favorable exercise of discretion.

A. Congress's Immigration Regime Employs a Complex Classification System that Distinguishes Between Different Kinds of Document Offenses

Congress's immigration scheme does not treat all false document offenses equally. The law considers the circumstances of the offense, the length of the sentence, and the harm to a victim (if any) to

determine the immigration consequences of a particular offense.

Immigration law categorizes document offenses based on (1) whether the offense may be labeled as one involving moral turpitude;[42] (2) whether the offense may be labeled as an aggravated felony;[43] and (3) whether the offense is an act of general misrepresentation of a false claim of citizenship.[44] The inclusion of a particular false document offense in any one of these categories will determine, in part, its collateral immigration consequences.

In determining whether a particular false document offense is a crime involving moral turpitude, the intent required by the statute at issue is paramount.[45]

[42] Conviction of an offense characterized as a crime of moral turpitude may render an immigrant inadmissible under 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2006) or deportable under 8 U.S.C. § 1227(a)(2)(A)(i) (2006).

[43] Conviction of an offense characterized as an aggravated felony may render an immigrant deportable under 8 U.S.C. § 1227(a)(2)(A)(iii). The law defines aggravated felonies at 8 U.S.C. § 1101(a)(43) (2006).

[44] General misrepresentation and falsely claiming citizenship are two offenses that could render an immigrant inadmissible. 8 U.S.C. § 1182(a)(6)(C).

[45] *See Notash v. Gonzales*, 427 F.3d 693, 698-700 (9th Cir. 2005) (attempted entry of goods into the United States by means of a false statement is not a crime involving moral turpitude if an intent to defraud was not an essential element of the offense); *Matter of Franklin*, 20 I. & N. Dec. 867 (BIA 1994) (involuntary manslaughter conviction is a crime of moral turpitude if an element of the crime had the requisite *mens rea*).

Courts have defined moral turpitude as involving conduct "that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general."[46] The BIA has found that some document offenses involve moral turpitude, whereas others do not.[47] In addition, in reviewing the BIA's determinations, Courts of Appeals have reached different conclusions about whether particular false document offenses constitute crimes involving moral turpitude.[48]

Congress set out detailed statutory requirements to determine whether a particular crime qualifies as an "aggravated felony." Several provisions of the INA's aggravated felony definition could apply to false document offenses.[49] These provisions reference fraud offenses where the loss to the victim exceeds $10,000,[50] theft offenses for which the term of imprisonment is

[46] *Medina v. United States*, 259 F.3d 220, 227 (4th Cir. 2001) (citing *Matter of Danesh*, 19 I. & N. Dec. 669, 670 (BIA 1988)).

[47] *Matter of Serna*, 20 I. & N. Dec. 579, 583-86 (BIA 1992) (a conviction under 18 U.S.C. § 1546 for possession of a false document with knowledge of its altered nature but without its use does not qualify as a crime involving moral turpitude).

[48] *Compare Beltran-Tirado v. INS*, 213 F.3d 1179, 1186 (9th Cir. 2000) (holding that a 42 U.S.C. § 408(a)(7) conviction is not a crime involving moral turpitude) *with Hyder v. Keisler*, 506 F.3d 388, 393 (5th Cir. 2007) (reaching the opposite conclusion).

[49] *See* 8 U.S.C. § 1101(a)(43)(G), (M), (P) (2006).

[50] 8 U.S.C. § 1101(a)(43)(M).

one year or more,[51] and specified false document offenses (*e.g.*, 18 U.S.C. § 1546(a)) accompanied by a sentence of at least twelve months.[52] These statutory definitions set out specific inquiries regarding the length of the sentence, the amount of harm, and the elements of the offenses that must be considered in relation to a particular conviction.

The INA also distinguishes between false document offenses involving general misrepresentations in the procurement of immigration documents and false claims of citizenship.[53] The law draws a line between fraudulently or willfully misrepresenting a material fact and falsely representing oneself to be a citizen of the United States.[54]

B. Congress's Immigration Regime Creates Paths to Relief from Removal that Consider Both the Classification of Offenses and Individual Equities

The existence of various forms of relief from removal, and their nuanced treatment of false document offenses, contradicts the idea that Congress intended immigrant workers without knowledge to be treated uniformly under 18 U.S.C. § 1028A. To preserve family unity, address humanitarian needs, and

[51] 8 U.S.C. § 1101(a)(43)(G).

[52] 8 U.S.C. § 1101(a)(43)(P).

[53] 8 U.S.C. § 1182(a)(6)(C)(i)-(ii) (2006).

[54] *Id.*

protect victims of serious crimes, Congress created forms of relief from removal. Each form of relief balances the nature and seriousness of certain criminal transgressions with the equities of each individual's circumstances and actions. The forms of relief include cancellation of removal, the U-visa, asylum, voluntary departure, and adjustment of status.

- **Cancellation of removal**

Congress designed cancellation of removal to prevent the removal of immigrants with long-standing ties to the United States and allow them to adjust their status to that of lawful permanent residents.[55] To be eligible for cancellation of removal, an immigrant without prior legal status must meet several threshold requirements, including ten years of continuous presence in the United States, good moral character, an absence of convictions for listed criminal offenses, and a showing that removal would result in "exceptional and unusual hardship" to listed family members.[56] A person with a false document offense not classified as a crime involving moral turpitude or aggravated felony would be eligible for cancellation of removal.[57] An immigration judge exercises discretion in determining whether to cancel removal.

[55] 8 U.S.C. § 1229b(b)(1) (2006).

[56] 8 U.S.C. § 1229b(b)(1)(A)-(D).

[57] 8 U.S.C. § 1229b(b)(1)(C).

- **U-visa**

The immigration law also offers relief to victims of specified crimes in the form of a U-visa. Immigrant victims of rape, trafficking, sexual assault, abusive sexual contact, and other specified crimes are eligible for a U-visa if they have suffered substantial physical or mental abuse as a result of the victimization, possess information concerning the crime, are willing to cooperate with law enforcement officials or prosecutors in investigating or prosecuting the crime.[58] A false document conviction does not prevent an otherwise-eligible immigrant from obtaining a U-visa.[59] After obtaining a U-visa, an immigrant receives three years of temporary legal status after which she will be able to apply to adjust her status to lawful permanent resident if doing so would promote family unity, serve humanitarian purposes, or otherwise serve the public interest.[60] The Attorney General has the discretion to weigh these equities and determine whether adjustment of status for a U-visa holder would properly serve these objectives.[61] U-visas may have been

[58] 8 U.S.C. § 1101(a)(15)(U)(i)-(iii) (2006).

[59] The Department of Homeland Security has stated that immigrants who have committed a crime other than the one under investigation or prosecution for which the U-visa is sought remain eligible for the visa. New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53014, 53018 (proposed Sept. 17, 2007) (to be codified at 8 C.F.R. pt. 103, 212, 214, 248, 274a and 299).

[60] 8 U.S.C. § 1255(m)(1)(A) (2006).

[61] 8 U.S.C. § 1255(m)(1).

especially helpful to Agriprocessors employees in Postville given the allegations of sexual abuse and child labor offenses allegedly perpetrated by the plant's management.[62]

- **Asylum**

The immigration law offers asylum to immigrants who would face persecution in their home country. To be eligible for asylum, an immigrant must have a credible fear of persecution in their country of origin on the basis of race, religion, nationality, social group, or political affiliation.[63] Immigrants convicted of offenses that are classified as aggravated felonies are disqualified from consideration for relief.[64] However, immigrants convicted of document offenses falling outside of the aggravated felony definition would still be eligible.

- **Voluntary departure**

Voluntary departure allows immigrants to leave the country with greater flexibility for future reentry.[65]

[62] *NIJC Report*, *supra* note 6, at 2-3; Julia Preston, *Child Labor Charges Are Sought Against Kosher Meat Plant in Iowa*, N.Y. TIMES, Aug. 6, 2008, at A15.

[63] 8 U.S.C. § 1158(b)(1)(A) (2006) (referencing 8 U.S.C. § 1101(a)(42)(A)).

[64] 8 U.S.C. § 1158(b)(2)(B)(i).

[65] *See* 8 U.S.C. § 1229c. Flexibility in future reentry options is one of the key benefits of voluntary departure. An immigrant

(Continued on following page)

Immigrants ordered removed face ten to twenty-year bars to reentry.[66] In contrast, individuals who depart voluntarily face fewer obstacles should a legal path to immigration become available.[67] A false document conviction would not preclude an immigrant from successfully seeking voluntary departure unless the particular offense was classified as an aggravated felony.[68] Voluntary departure may have been an especially attractive option to immigrant workers in Postville because many had U.S. citizen children and may have wanted flexible reentry options.[69]

- **Adjustment of status**

The immigration law offers some relief to an immigrant who is seeking an adjustment in immigration

granted this form of relief also "avoids extended detention pending completion of travel arrangements; is allowed to choose when to depart (subject to certain constraints); and can select the country of destination." *Dada v. Mukasey*, 128 S. Ct. 2307 (2008).

[66] When an immigrant is removed pursuant to a judicial removal order, 8 U.S.C. § 1182(a)(9)(A)(ii) (2006) provides that he is barred from seeking readmission for ten years, or 20 years in the case of a second or subsequent removal or an aggravated felony.

[67] In contrast to the statutory bars in 8 U.S.C. § 1182(a)(9)(A)(ii), those awarded voluntary departure must overcome only the shorter bars contained in 8 U.S.C. § 1182(a)(9)(B)(i) which are more easily waived under 8 U.S.C. § 1182(a)(9)(B)(v).

[68] 8 U.S.C. § 1229c(a)(1) (2006).

[69] Camayd-Freixas, *supra* note 16, at 8.

status and is the spouse, son, or daughter of a U.S. citizen or lawful permanent resident.[70] While general misrepresentation and falsely claiming citizenship would render an immigrant inadmissible,[71] the law provides a waiver of the former offense if extreme hardship would result from refusal of admission.[72] An immigrant who has been convicted of general misrepresentation, but not falsely claiming citizenship, would be eligible for a waiver.[73] The Attorney General may exercise discretion in determining whether to issue the waiver.[74]

These are just some of the forms of relief that represent Congress's policy of balancing equities against past wrongdoing.

C. Congress Could Not Plausibly Have Intended a One-Size-Fits-All Approach to 18 U.S.C. § 1028A Given Its Careful Consideration to the Same Matters in its Immigration Regime

As Postville demonstrated, the Eighth Circuit's reading of 18 U.S.C. § 1028A led to results that were completely contrary to Congress's immigration law. Immigrant workers in Postville who possessed false

[70] 8 U.S.C. § 1255 (2006).

[71] 8 U.S.C. § 1182(a)(6)(C) (2006).

[72] 8 U.S.C. § 1182(i).

[73] *Id.*

[74] 8 U.S.C. § 1182(i)(1).

documents that bore real Social Security numbers faced a mandatory two-year sentence under the Eighth Circuit's broad reading of 18 U.S.C. § 1028A. This serious sentence created the leverage for prison sentences and judicial deportation orders that bypassed the immigration system. This one-size-fits-all approach, premised on the arbitrary fact of whether a Social Security or alien registration number matched that of a real person, ignored culpability, equities, and seriousness of harm, all of which would have been considered by the immigration law's treatment of the same underlying conduct. Congress could not have intended 18 U.S.C. § 1028A to lead to results so at odds with its longstanding approach to false document offenses under the immigration law.

♦

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the decision from the United States Court of Appeals from the Eighth Circuit be reversed.

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v.

UNITED STATES OF AMERICA,

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On a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF *AMICI CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC) AND LEGAL SCHOLARS AND TECHNICAL EXPERTS IN SUPPORT OF THE PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 7

ARGUMENT 8

I. "IDENTITY THEFT" IS DEFINED AS THE KNOWING IMPERSONATION OF ANOTHER 8

A. Identity Management is a Field in Information Science that Concerns Assignment of Attributes and Credentials so as to Promote Privacy and Security 8

B. "Identity Theft" has a Well Understood Meaning in the Technical Community 10

C. The Definition of "Identity Theft" Does Not Include the Unknowing Use of Inaccurate Credentials 15

II. THE IDENTITY THEFT PENALTY ENHANCEMENT ACT'S KNOWLEDGE REQUIREMENT APPROPRIATELY REFLECTS THE DISTINCTION BETWEEN "IDENTITY THEFT" AND PRESENTATION OF INACCURATE CREDENTIALS 17

A. *The Application of Section 1028A's Knowledge Requirement to All the Section's Terms is Consistent with the Technical Definition of "Identity Theft"* 18

B. *Failure to Apply Section 1028A's Knowledge Requirement to All the Section's Terms is Inconsistent with the Technical Definition of "Identity Theft"* 18

III. THE 8TH CIRCUIT INTERPRETATION THREATENS TO IMPOSE ENHANCED IDENTITY THEFT PENALTIES ON INDIVIDUALS WHO ARE NOT IDENTITY THIEVES – INDIVIDUALS WHO PRESENT INACCURATE CREDENTIALS IN AN EFFORT TO PROTECT THEIR PRIVACY THROUGH PSEUDONYMOUS OR ANONYMOUS ACTIVITIES 19

CONCLUSION **26**

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INTEREST OF THE *AMICI CURIAE*[1]

The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C., which was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other Constitutional values. EPIC has participated as *amicus curiae* in several cases before this Court and other courts concerning privacy issues, new technologies, and Constitutional interests, including *Herring v. United States*, 492 F.3d 1212 (11th Cir. 2007), *cert. granted* 76 U.S.L.W. 3438 (Feb. 19, 2008) (No. 07-513); *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008); *Hiibel v. Sixth Judicial Circuit of Nevada*, 542 U.S. 177 (2004); *Doe v. Chao*, 540 U.S. 614 (2003); *Smith v. Doe*, 538 U.S. 84 (2003); *Department of Justice v. City of Chicago*, 537 U.S. 1229 (2003); *Watchtower Bible and Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002); *Reno v. Condon*, 528 U.S. 141 (2000); *National Cable and*

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. On December 12, 2008, Petitioner filed with the Court his "Consent to the filing of amicus briefs, in support of either party or neither party." *Amici* lodged with the Court Respondent's letter of consent contemporaneous with the filing of this brief. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

Telecommunications Association v. Federal Communications Commission, No. 07-1312 (D.C. Cir. filed Aug. 7, 2007); *Bunnell v. Motion Picture Association of America*, No. 07-56640 (9th Cir. filed Nov. 12, 2007); *Kohler v. Englade*, 470 F.3d 1104 (5th Cir. 2006) 470 F.3d 1104 (5th Cir. 2006); *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004), *cert. denied* 544 U.S. 924 (2005); and *State v. Raines*, 857 A.2d 19 (Md. 2003).

EPIC has a particular interest in the proper interpretation and application of identity theft statutes. Several members of the EPIC Advisory Board are leading experts in the development of identity management systems, computer security protocols, encryption standards, and other related technical measures that seek to minimize the risk of identity theft while ensuring privacy and security. EPIC supports the right of individuals to remain anonymous or pseudonymous, as well as to submit fictitious, incomplete, or inaccurate information in response to invasive or unnecessary demands for personal information, as long as the individual does not knowingly impersonate someone else or intend harm to someone else.[2]

[2] *See, e.g., Brief of Amicus Curiae Electronic Privacy Information Center, American Civil Liberties Union, American Civil Liberties Union of Ohio and 14 Legal Scholars in Support of Watchtower Bible, etc, Petitioners, Watchtower Bible and Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002) (No. 00-1737) *available at* http://www.epic.org/anonymity/watchtower.pdf (supporting First Amendment Right to anonymous door-to-door speech); *Brief of Amicus Curiae Electronic Privacy*

EPIC has also routinely urged lawmakers, regulators, and courts to take meaningful steps to curb identity theft.[3]

Information Center, Peterson v. National Telecommunications and Information Association, 478 F.3d 626 (4th Cir. 2007) (Nos. 06-1216, 06-1548) *available at* http://www.epic.org/privacy/peterson/epic_peterson_amicus.pdf (supporting First Amendment Right to anonymity in Internet domain name registrations); Letter from EPIC, Privacy International, and Human Rights Watch to Secretary Robert M. Gates, U.S. Department of Defense (July 27, 2007) *available at* http://www.epic.org/privacy/biometrics/epic_iraq_dtbs.pdf (supporting Iraqi nationals who change their names or carry fake IDs to avoid being murdered by rival sects).

[3] *See, e.g.*, Marc Rotenberg, EPIC Executive Dir., *Statement Before Joint Session of the House Financial Services Subcommittee on Oversight and Investigations and the House Ways and Means Subcommittee on Social Security*, 109th Cong. (Nov. 8, 2001) *available at* http://www.epic.org/privacy/ssn/testimony_11_08_2001.html; *Comments of the Electronic Privacy Information Center to the Federal Trade Commission*, ID Workshop Comment P075402, Mar. 23, 2007, *available at* http://epic.org/privacy/id-cards/epic_ftc_032307.pdf; *Brief of Amici Curiae AARP, ACLU of Northern California, California Public Interest Research Group, Consumer Federation of California, Consumers Union, Electronic Privacy Information Center, Evan Hendricks, National Association of Consumer Attorneys, Privacy Rights Clearinghouse, and US PIRG, in Support of Defendant-Appellees, Supporting Affirmance, American Bankers Assoc. v. Lockyer*, 541 F.3d 1214 (9th Cir. 2004) (Nos. 05-

The Eighth Circuit's determination in the present case threatens to impose aggravated identity theft penalties on individuals who use fictitious identities but do not intend to impersonate someone else. The outcome is inconsistent with the widely understood meaning of "identity theft." EPIC believes that the Congressional statute accurately reflected this distinction and was therefore misapplied in this case where a person was convicted of aggravated identity theft even though he did not intend to impersonate someone else.

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SUMMARY OF THE ARGUMENT

The statute under consideration by the Court was intended to punish intentional, fraudulent impersonation of another, not the creation of partly fictitious documents to receive employment or public benefits. This distinction is crucial, not only to the proper application of federal law, but also to the development of appropriate techniques to safeguard privacy and security. The Court should not set a precedent that might inadvertently render the use of privacy enhancing pseudonyms, anonymizers, and other techniques for identity management unlawful. Such an outcome could result in an increase in identity theft and undermine the very purpose of the statutory provision.

ARGUMENT

I. "Identity Theft" is Defined as the Knowing Impersonation of Another

The term "identity theft" has a specific meaning among technologists, academics, security professionals, and other experts in the field of identity management, which is reflected in the statute under consideration by the Court. It refers to the knowing impersonation of one person by another. The unknowing use of inaccurate credentials does not constitute identity theft.

A. Identity Management is a Field in Information Science that Concerns Assignment of Attributes and Credentials so as to Promote Privacy and Security

Identity management is a relatively young field in Information Science.[4] Identity management involves managing individuals' various partial identities, often expressed as pseudonyms, and addresses the establishment, description, activity, and destruction of identities.[5] The field recognizes

[4] Andreas Pfitzmann and Marit Hansen, *Anonymity, Unlinkability, Undetectability, Unobservability, Pseudonymity, and Identity Management – A Consolidated Proposal for Terminology*, TU Dresden Faculty of Computer Science, Feb. 15, 2008 at 6 *available at* http://dud.inf.tu-dresden.de/literatur/Anon_Terminology_v0.31.doc.

[5] *Id.* at 31 (stating "identity management means managing various partial identities (usually denoted by

that "all social and economic interactions between human beings in modern civilization require the exchange of some personal data," and endeavors to resolve the privacy and security issues that arise from these interactions through the use of identity management systems.[6] Identity management systems are commonly encountered in everyday life. They are generally used to control access to valuable assets or space, facilitate interactions or transactions, or track the locations of people or things.[7]

One example of identity management is the use of passwords or PIN numbers by Internet web sites and banks.[8] Other identity management systems are used to confirm credit card transactions, issue

pseudonyms) of an individual person, i.e., administration of identity attributes including the development and choice of the partial identity and pseudonym to be (re) used in a specific context or role."); *see also* Identity Management – Wikipedia, the free encyclopedia, http://en.wikipedia.org/wiki/Identity_management (last visited Dec. 16, 2008).

[6] About PRIME – Portal for the PRIME Project, https://www.prime-project.eu/about (last visited Dec. 16, 2008).

[7] National Electronic Commerce Coordinating Council, *The Technology of Identity: A Primer & Resource Guide* (Dec. 2006) at 4, *available at* http://www.ec3.org/downloads/workgroups/2006/Technology%20of%20Identity%20-%20white%20paper.pdf.

[8] *Id.* (stating "One of the most ordinary examples of using the technology of identity is that of logging onto a website, desktop or network that requires a PIN or username and password.").

electronic airline tickets, and pay for highway tolls.[9] Effective identity management systems must provide security and protect individuals' privacy.[10] Identity management systems are also designed to prevent identity theft.

B. "Identity Theft" has a Well Understood Meaning in the Technical Community

Data security specialists use precise terms to describe identity authentication and identity theft, insisting that "a common understanding and consistent use of . . . terms . . . are a prerequisite for informed discussion."[11] "Identity theft" involves the knowing impersonation of one person by another.[12]

[9] Nat'l Research Council, *Who Goes There? Authentication Through the Lens of Privacy* (2003) at 23-25.

[10] *Id.* at 28, 178; Stefan Brands, *A Primer on User Identification*, Panopticon, The 15th Annual Conference on Computers, Freedom & Privacy, Keeping an Eye on the Panopticon: Workshop on Vanishing Anonymity, Seattle (April 12, 2005) *available at* http://www.idtrail.org/content/view/21/42/ at 4-12.

[11] *Id.* at 2.

[12] *See, e.g., Id.* at 99 ("Identity theft occurs when someone usurps a portion of another person's personal identifying information in order to pose as that person." emphasis added); Jerry Kang, *Information Privacy In Cyberspace Transactions*, 50 Stan. L. Rev. 1193, 1215 n. 84 (1998) (stating "[i]n identity theft, an impostor obtains enough personal information to impersonate his victim in financial transactions."); Jerry Kang, *Cyberspace Privacy: A Primer and Proposal*, 26 Hum. Rts. 3 (1999) ("personal data can be used to commit identity theft, in which an

Identity theft is characterized by the use of numerous attributes that describe the identity theft victim, usually including "some combination of name, address, Social Security Number, mother's maiden name, password, credit card number, date of birth, driver's license number, and employer."[13] Identity theft goes beyond the theft of one of the victim's attributes "to the misappropriation of a person's very identity."[14]

The definition of identity theft stems from a crucial distinction between "identity" authentication and "attribute" authentication.[15] The distinction is critical; many authentication systems provide security while preserving anonymity by allowing for

impostor creates fake financial accounts, runs up enormous bills, and disappears leaving only a wrecked credit report behind."); Lynn M. LoPucki, *Human Identification Theory and the Identity Theft Problem*, 80 Tex. L. Rev. 89, 90 (2001) (defining "identity theft" as "any impersonation of a specific individual."); *but see* U.S. General Accounting Office, *Identity Theft: Prevalence and Cost Appear to be Growing*, (Mar. 2002) at 5 n. 7 *available at* http://www.gao.gov/cgi-bin/getrpt?GAO-02-363 ("the Secret Service defined 'identity theft' as any case related to the investigation of false, fraudulent, or counterfeit identification; stolen, counterfeit, or altered checks or Treasury securities; stolen, altered, or counterfeit credit cards; or financial institution fraud.").

[13] *Who Goes There?*, note 9 *supra*, at 99.

[14] *Id.*

[15] *Id.* at 19-20. (distinguishing between "individual authentication" and "attribute authentication").

the separation of attributes and identification.[16] In simple terms, this can be understood when a member of a health club, for example, is granted access to the club on the presentation of a credential that certifies membership. The individual's actual identity is not necessary for the entry determination; it is the presentation of the credential that provides the basis for the determination.

Identity authentication involves "establishing ... confidence that an identifier refers to an identity."[17] Attribute authentication establishes "confidence that an attribute applies to a specific individual."[18]

[16] *See, e.g.*, Carlisle Adams, *Delegation and Proxy Services in Digital Credential Environments*, Presented at the 7th Annual Privacy and Security Workshop, *Your Identity Please: Identity Theft and Identity Management in the 21st Century* (Nov. 2, 2006), *available at* http://www.idtrail.org/files/cacrwkshpdigcred02nov06.pdf; Stefan Brands, *Non-Intrusive Cross-Domain Digital Identity Management*, Presented at Proceedings of the 3rd Annual PKI R&D Workshop (Apr. 2004), *available at* http://www.idtrail.org/files/cross_domain_identity.pdf; David Chaum, *Secret-Ballot Receipts: True Voter-Verifiable Elections*, Presented at ITL Seminar Series, *Secret-Ballot Receipts: True Voter-Verifiable Elections*, Nat'l Inst. of Standards & Tech. (May 19, 2004); Paul Van Oorschot and S. Stubblebine, *Countering Identity Theft through Digital Uniqueness, Location Cross-Checking, and Funneling*, Fin. Cryptography & Data Sec. (2005), *available at* http://www.scs.carleton.ca/~paulv/papers/pvoss6-1.pdf.

[17] *Who Goes There?*, note 9 *supra*, at 2.

[18] *Id.*

An identity is "a set of information about an individual that is associated with that individual."[19] Identities "consist of more than just names," and "include other [identifying] facts," such as biographical data.[20] Attributes are "propert[ies] associated with an individual," including physical attributes and job status.[21]

The technical definitions demonstrate that "identity theft" involves the improper impersonation of another individual, complete with the theft of the "set of information about an individual that is associated with that individual" and "the misappropriation of a person's very identity." A person who uses many attributes belonging to another individual is likely to be an identity thief. In contrast, the use of a false, incomplete, or inaccurate attribute, which may or may not belong to another individual, would not generally be considered identity theft. A person who uses many attributes that belong to another individual is more likely to be committing identity theft than a person who uses a single attribute that may or may not belong to another.

For example, in 2007, a criminal ring impersonated others in an effort to obtain credit from merchants and defraud their creditors – they are plainly identity thieves.[22] To execute the scam, the

[19] *Id.* at 20.

[20] *Id.*

[21] *Id.* at 19, 43.

[22] Marie Price, *Grand jury in OKC indicts for bank fraud, identity theft*, Oklahoma City Journal Record, Sep 10, 2007 *available at*

thieves fraudulently obtained driver's licenses and Social Security cards, produced fake ID's in the victims' names, and created counterfeit checks linked to the purloined identities.[23] These activities involve misappropriation of many elements in the "set of information about an individual that is associated with that individual" and constitute "the misappropriation of a person's very identity."

The use of another individual's single attribute is altogether different. Many individuals share attributes. For example, the most recent census indicates that 138.1 million "men" live in the U.S.[24] Millions of American males cannot be branded "identity thieves" for listing their gender attribute on ID documents. Similarly, Wal-Mart employs approximately 2,055,000 individuals.[25] An unemployed young man may be up to mischief if he tells his date that he is a "Wal-Mart employee." But he is not an identity thief.

http://findarticles.com/p/articles/mi_qn4182/is_/ai_n19516519; ID Theft Project, *US: 2 go to prison in identity theft*, Nov. 12, 2008 *available at* http://www.id-theftprotect.com/news.php?news_id=258&news_keyword=identity%20theft.

[23] *Id.*

[24] Denise I. Smith and Renee E. Spraggins, U.S. Census Bureau, *Gender: 2000*, Sept. 10, 2001 *available at* http://www.census.gov/prod/2001pubs/c2kbr01-9.pdf.

[25] Global 500 2008: Wal-Mart Stores, CNNMoney.com, http://money.cnn.com/magazines/fortune/global500/2008/snapshots/2255.html (last visited Dec. 10, 2008).

C. The Definition of "Identity Theft" Does Not Include the Unknowing Use of Inaccurate Credentials

As set forth above, there is a clear understanding of what behavior constitutes identity theft – the knowing impersonation of another individual. The unknowing use of inaccurate credentials does not fall within this definition. Individuals present credentials to support their claim to an attribute.[26] Credentials, such as Social Security Numbers, are often presented to support the authenticity of an attribute, such as citizenship or taxpayer status.[27]

Unknowing use of another's credentials does not meet the identity theft definition's knowledge requirement. A person who uses a credential that they believe to be fictitious – for example, an ID number created out of whole cloth, which the person believes to be unassigned to anyone – does not knowingly pose as another individual, because they do not know to whom (if anyone) the credential belongs. Furthermore, use of a single inaccurate credential does not typically qualify as "impersonation" – a term that embodies the requirement that identity thieves steal a "set of information about an individual" and misappropriate the victim's "very identity." Use of a single inaccurate credential rarely equates with stealing another person's "very identity." Identity theft only occurs if the imposter knows that she is impersonating a

[26] *Who Goes There?*, note 9 *supra* at 20 (referring to credentials as "authenticators").

[27] *Id.*

particular individual, and most often includes the use of multiple, consistent credentials. For example, it is possible to create a Social Security Number that is not one's own, but that also provably does not belong to someone else, *e.g.* 487-00-4218, 666-38-4719, and 987-65-4329.[28] Such use of SSNs may, in certain circumstances, be improper, but it does not involve "identity theft."

In the case now before this Court, Ignacio Flores-Figueroa presented two inaccurate credentials to his employer.[29] The credentials, a Social Security card and Permanent Resident card, bore Mr. Flores-Figueroa's real name, but numbers assigned to others.[30] The Social Security card included a number assigned to a minor, while the Permanent Resident card featured a number assigned to an adult.[31]

[28] Social Security Administration, "Which Social Security numbers are invalid (impossible)?" (Answer ID 425) http://ssa-custhelp.ssa.gov/cgi-bin/ssa.cfg/php/enduser/std_adp.php?p_faqid=425&p_created=972930021&p_sid=V8vXQkOi&p_accessibility=0&p_redirect=&p_lva=&p_sp=cF9zcmNoPTEmcF9zb3J0X2J5PSZwX2dyaWRzb3J0PSZwX3Jvd19jbnQ9OSw5JnBfcHJvZHM9JnBfY2F0cz0xNiZwX3B2PSZwX2N2PTEuMTYmcF9wYWdlPTEmcF9zZWFyY2hfdGV4dD12YWxpZA**&p_li=&p_topview=1; *See* LUNA, HOW TO BE INVISIBLE (2004).

[29] *Petition for a Writ of Certiorari* at 4, *Flores-Figueroa v. United States*, No. 08-108 (U.S. July 22, 2008); *Brief for the United States* at 2-3, *Flores-Figueroa v. United States*, No. 08-108 (U.S. Sept. 19, 2008).

[30] *Petition for a Writ of Certiorari*, *supra* note 29 at 4; *Brief for the United States*, *supra* note 29 at 3.

[31] *Id.*

Neither person shared Mr. Flores-Figueroa's name.[32] In addition to his proper name, Mr. Flores-Figueroa presumably shared other accurate attributes with his employer – home address, telephone number, age, and work history data. At trial, the government presented no evidence that Mr. Flores-Figueroa knew that the numbers on his inaccurate credentials were assigned to others. Petitioner's use of a single credential linked to each alleged identity theft victim strongly suggests that he did not steal a "set of information about an individual" and misappropriate the victim's "very identity." Most dramatically, Mr. Flores-Figueroa's use of his own name on the inaccurate credentials indicates a complete absence of intent to impersonate another.

II. The Identity Theft Penalty Enhancement Act's Knowledge Requirement Appropriately Reflects the Distinction Between "Identity Theft" and Presentation of Inaccurate Credentials

As discussed above, "identity theft" is defined as the knowing impersonation of another individual. The Identity Theft Penalty Enhancement Act, 18 U.S.C. § 1028A(a)(1) (2008) ("Section 1028A"), contains a knowledge requirement, which appropriately reflects the distinction between identity theft and the presentation of inaccurate credentials.

[32] *Id.*

A. The Application of Section 1028A's Knowledge Requirement to All the Section's Terms is Consistent with the Technical Definition of "Identity Theft"

Petitioner has asked the Court to apply Section 1028A's knowledge requirement to all the section's terms, including the statutory phrase "means of identification of another person."[33] Such an application would permit conviction of a defendant for "aggravated identity theft" only when the accused "transfers, possesses, or uses ... a means of identification of another person" and the defendant knew that the "means of identification" – the credential – belonged to another person. This interpretation is consistent with the widely accepted technical definition of identity theft, which also contains a knowledge requirement, and defines an "identity thief" as one who misappropriates a set of information – usually numerous attributes – about a particular individual, thus robbing the individual of her very identity.

B. Failure to Apply Section 1028A's Knowledge Requirement to All the Section's Terms is Inconsistent with the Technical Definition of "Identity Theft"

The Respondent has argued that the Court should not apply Section 1028A's knowledge requirement to the statutory phrase "means of identification of another person."[34] Respondent's

[33] *Petition for a Writ of Certiorari*, *supra* note 29 at 21.

[34] *Brief for the United States*, *supra* note 29 at 4.

interpretation would permit aggravated identity theft convictions in circumstances involving individuals who present inaccurate credentials, but do not know that the credentials belong to another person. This could include situations in which individuals use fictitious ID numbers, names, or other attributes in order to obtain work, protect their privacy, or engage in lawful but unpopular speech. Such an interpretation is squarely at odds with the technical definition of "identity theft" described above. The Court should interpret Section 1028A to ensure consistency with the plain meaning of "identity theft." This is particularly important given Congress' intent to narrowly target the Identity Theft Penalty Enhancement Act at the crime of identity theft, and not other frauds, no matter how closely related.[35]

III. The 8th Circuit Interpretation Threatens to Impose Enhanced Identity Theft Penalties on Individuals Who are Not Identity Thieves – Individuals Who Present Inaccurate Credentials In an Effort to Protect Their Privacy Through Pseudonymous or Anonymous Activities

In *Flores-Figueroa v. United States* and *United States v. Mendoza-Gonzalez*, the 8th Circuit interpreted Section 1028A to permit conviction of a defendant for "aggravated identity theft" when the accused "transfers, possesses, or uses ... a means of

[35] H.R. Rep. No. 108-528 at 3 (2004) (stating that Section 1028A's aggravated identity theft penalties were enacted to "provide[] enhanced penalties for persons who steal identities to commit ... serious crimes.").

identification of another person" even if the defendant did not know that the "means of identification" – the credential – belonged to another person ("the 8th Circuit interpretation").[36] By failing to apply Section 1028A's knowledge requirement to the phrase "means of identification of another person," the 8th Circuit interpretation of Section 1028A imposes a two-year sentence enhancement for "aggravated identity theft" on individuals who are not identity thieves.[37] Because Petitioner truthfully identified himself while proffering an inaccurate credential, the 8th Circuit's characterization of Petitioner as an "identity thief" is contrary to the definition of "identity theft" widely accepted by identity management and security experts and implicit in the statutory provision. Beyond the improper sentence enhancement in this case, the 8th Circuit's interpretation threatens to impose aggravated identity theft penalties on individuals who present inaccurate credentials in an effort to protect their privacy through pseudonymous or anonymous activities.

Individuals engage in pseudonymous or anonymous activities for a variety of reasons. For some, it is a matter of life or death.[38] Others have

[36] *Flores-Figueroa v. United States*, 274 Fed. Appx. 501, (8th Cir. 2008), *cert. granted*, 2008 U.S. LEXIS 7827 (U.S. October 20, 2008) (No. 08-108); *United States v. Mendoza-Gonzalez*, 520 F.3d 912 (8th Cir. 2008).

[37] 18 U.S.C. § 1028A.

[38] *See, e.g.*, Letter from EPIC, Privacy International, and Human Rights Watch to Secretary Robert M. Gates, U.S.

less grisly reasons for using pseudonyms. Higher education administrators regularly use constructed identity attributes for student records and admissions applications for a variety of reasons, including the varied credentials of international students pursuing a global education.[39] Litigants

Department of Defense (July 27, 2007) *available at* http://www.epic.org/privacy/biometrics/epic_iraq_dtbs.pdf (describing how Iraqi citizens change their names or carry fake IDs to avoid being murdered by rival sects, and observing "numerous reports indicate that Iraqis regularly risk death if they are proven to be of a different sect than gunmen at a checkpoint."); *Dozens killed in Baghdad attacks*, BBC, July 9, 2006, *available at* http://news.bbc.co.uk/1/hi/world/middle_east/5162510.stm (describing a July 2006 militia attack involving the establishment of a fake Shiite-run checkpoint near Baghdad, which resulted in the deaths of 50 Sunnis after their identification documents were examined); *At Checkpoints in Baghdad, Disguise Is a Lifesaving Ritual*, Wash. Post, Sept. 29, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/09/28/AR2006092801996_pf.html (quoting Gianni Magazzeni, head of the U.N. human rights office for Iraq, "People are basically killed or taken away simply because of their name, their identity or specific affiliations.").

[39] Office of the Inspector General, U.S. Social Security Administration, *Review of Universities' Issuance of Temporary Social Security Numbers to Foreign Students* (April 2004) (analyzing "numerous instances in which universities issued temporary ... 'dummy' or 'pseudo'" social security numbers, including circumstances in which "the Florida Bureau of State Payrolls assigned a range of temporary 9-digit identification numbers (800-series) to 11

proceed under pseudonyms to protect their privacy.[40] Others pursue lawsuits under pseudonyms that both protect their identities and serve as extensions of their advocacy.[41] Mary Ann Evans published under the pseudonym "George Eliot" in an effort "to ensure her works were taken seriously in an era when female authors were usually associated with romantic novels."[42] Many of America's founders published anonymously or pseudonymously.[43] Famous individuals have elected to receive medical

State universities and referred to them as temporary SSNs.").

[40] *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973).

[41] *See, e.g., Guy Montag Doe v. San Francisco Housing Authority*, No. 08-03112 (N.D. Cal. filed June 27, 2008) (Plaintiff challenges the Constitutionality of San Francisco gun control ordinance under pseudonym referencing Guy Montag, a literary protagonist who rebels against authoritarian regulations); *see also* RAY BRADBURY, FAHRENHEIT 451 (1953).

[42] BBC History – George Eliot (1819-1880), http://www.bbc.co.uk/history/historic_figures/eliot_george.shtml (last visited Dec. 12, 2008).

[43] *See* ROBERT ELLIS SMITH, BEN FRANKLIN'S WEB SITE: PRIVACY AND CURIOSITY FROM PLYMOUTH ROCK TO THE INTERNET 41-43 (2000) (citing well known pseudonymous authors including Benjamin Franklin, Alexander Hamilton, and Samuel Adams, and further estimating that "six Presidents, 15 Cabinet members, 20 Senators, and 34 Congressmen published unsigned political writings or writings under pen names" in the first two decades following Constitutional ratification).

care under pseudonyms.[44] The U.S. government is likely the largest single user of pseudonymous credentials in the country, providing them to enrollees in the Department of Justice's Witness Protection Program.[45]

Other, less famous individuals simply wish to protect their privacy. Anonymity – the ability to conceal one's identity while communicating – and pseudonymity – the use of a multiple identities – help to decrease the likelihood that a person's privacy will be violated, and their personal information exposed.[46] This is particularly important because technological developments have increased privacy risks by enhancing surveillance and data retention capabilities. Generally speaking, public and private entities are collecting more personal data, and retaining more information for longer periods.

[44] BARRON H. LERNER, WHEN ILLNESS GOES PUBLIC 144 (2006) (detailing Steve McQueen's use of a pseudonym while receiving mesothelioma treatment at Cedars-Sinai Medical Center in 1980).

[45] *See U.S. Marshals Service Talks WitSec to the World*, America's Star:FYI, Aug. 2006 *available at* http://www.usmarshals.gov/witsec/americas_star.pdf (stating that the federal government has given "more than 18,000 witnesses and their families ... new names, new identities, assistance with employment, and vocational training" through the Witness Protect Program, also called the "Witness Security Program.").

[46] David Chaum *Security Without Identification: Transaction Systems to Make Big Brother Obsolete*, Communications of the ACM, at 1030-1044 (Oct. 1985).

"It is becoming increasingly easy and common for organizations to routinely exchange data on individuals"[47] and "[i]ndividuals have no way of knowing if this information is inaccurate, outdated, or otherwise inappropriate, and may only find out when they are accused falsely or denied access to services."[48] However, individuals who wish to protect their privacy can limit distribution of their personal information by taking steps to safeguard it. One way to protect personal information is to use inaccurate credentials, thus preserving pseudonymity or anonymity.[49] Privacy experts advocate that individuals act anonymously or pseudonymously in some circumstances, and build such transactions into digital security and identity systems.[50]

[47] David Chaum, *Signatures Transferred Between Unconditionally Unlinkable Pseudonyms* (1986).

[48] *Security Without Identification*, note 44 *supra*.

[49] *Who Goes There?*, note 9 *supra*, at 178 (observing that "preserving the ability of citizens to interact anonymously with other citizens, with business, and with the government is important because it avoids unnecessary accumulation of identification data that could deter free speech and inhibit legitimate access to public records.").

[50] *See, e.g.*, David Chaum, *Achieving Electronic Privacy*, Scientific American, p. 96-101 (Aug. 1992) (describing a digital authentication system in which users "establish relationships with different organizations under different digital pseudonyms," and lauding the privacy benefits that accrue because "Each [organization] can recognize [the user] unambiguously, but none of their records can be linked."); Harris County Public Library – About – Internet Safety, http://www.hcpl.net/about/internetsafety.htm (last

The 8th Circuit interpretation threatens to improperly brand as identity thieves individuals who seek to protect their privacy through the use of inaccurate credentials. This would be a wholly unintended and undesirable result of the Congress' enactment of the Identity Theft Penalty Enhancement Act. It could also chill the use of privacy-protecting pseudonyms. Individuals could be deprived of a simple and effective tool in the battle for greater privacy – pseudonymous and anonymous transactions.

visited Dec. 16, 2008) (advising library users to reduce the risks of online data collection by "using a pseudonym and think carefully before revealing any personal information such as age, financial information, or marital status.").

CONCLUSION

Amici respectfully request this Court to grant Petitioner's motion to reverse the decision of the lower court.

Respectfully submitted,

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December 22, 2008

AMICUS CURIAE BRIEF

B628

No. 08-108

In The

Supreme Court of the United States

IGNACIO CARLOS FLORES-FIGUEROA
Petitioner,
v.
UNITED STATES,
Respondent.

—

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF THE MARYLAND CRIME VICTIMS' RESOURCE CENTER, INC., THE IDENTITY THEFT ACTION COUNCIL OF NEBRASKA, THE IDENTITY THEFT RESOURCE CENTER, TEXAS LEGAL SERVICES CENTER, THE NATIONAL CRIME VICTIM LAW INSTITUTE, AND THE NATIONAL CENTER FOR VICTIMS OF CRIME AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. THE STATUTE IS NOT AMBIGUOUS: IT DOES NOT REQUIRE THAT A VIOLATOR KNOW THAT THE FALSE IDENTITY HE IS USING BELONGS TO ANOTHER PERSON. 5

II. EVEN IF THE TEXT OF THE STATUTE WERE AMBIGUOUS, ANY SUCH AMBIGUITY WOULD BE CLARIFIED BY LEGISLATIVE HISTORY AND CONGRESSIONAL INTENT 10

A. The Accompanying Restitutionary Statute Reflects Congressional Understanding That There Is No Requirement That An Offender Under Section 1028A(a) Knows He Is Harming Another Person. 11

B. Petitioner's Reading of Section 1028A(a)(1) Would Undermine Congressional Intent to Assist Victims Via Section 3663(b)(6). 12

1. The Congressional Record with Respect to 1028A(a) Is Replete with References to the Harms Suffered by Victims Whose Identities Have Been Misappropriated. 13

2. The Harms Referenced in the Congressional Record for Section 1028A(a) Were Targeted by the Restitutionary Provision at Section 3663(b)(6). 15

3. Petitioner's Reading of Section 1028A(a)(1) Would Lead to the Arbitrary (and Absurd) Result that the Restitutionary Rights of Victims Will Be Contingent on Whether the Offender Happened to Know that the False Identity Belonged to Another Person. 16

C. Further, It Also Cannot Be Ignored that the Congressional Record Specifically References the Very Conduct in which Petitioner Was Engaged. 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Florida Power & Light Co. v. Lorion,
470 U.S. 729 (U.S. 1985) 10

Hughes Aircraft Co. v. Jacobson,
525 U.S. 432 (U.S. 1999) 5

Toibb v. Radloff,
501 U.S. 157 (U.S. 1991) 10

United States *v. Godin*,
534 F.3d 51 (1st Cir. 2008) 19

United States *v. Hohri*,
482 U.S. 64 (U.S. 1987) 10

United States v. Hurtado,
508 F.3d 603 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 2903 (2008) 8, 10

United States v. Jones,
471 F.3d 535 (4th Cir. 2006) 9

United States v. Mendoza-Gonzalez,
520 F.3d 912 (8th Cir. 2008), *petition for cert. pending*, No. 08-5316 (filed July 15, 2008) 8

United States v. Montejo,
442 F.3d 213 (4th Cir. 2006), *cert. denied*, 549 U.S. 879 (2006) 8

Statutes

18 U.S.C. § 1028A . . . . . passim

18 U.S.C. § 1028A(a) 5, 11

18 U.S.C. § 1028A(a)(1) . . . . . passim

18 U.S.C. § 1028A(c) 6

18 U.S.C. § 1028(a)(7) 16

18 U.S.C. § 3663(b)(6) . . . . . passim

Other Authorities

149 Cong. Rec. S12739, S12746 (Oct. 16, 2003) 4

150 Cong. Rec. H4808, H4809 (June 23, 2004) 14

150 Cong. Rec. H4808, H4810 (June 23, 2004) 14, 18

H.R. Rep. 108-528, *4 (2004), U.S.C.C.A.N. 779, 780 18

Russ Krebs, *Victim works to fix mess*, Fremont Tribune, January 24 – 25, 2009, http://www.fremonttribune.com/articles/2009/01/24/news/local/doc497a96debaeef725151811.txt 4

INTEREST OF *AMICI CURIAE*[1]

The Maryland Crime Victims' Resource Center, Inc. ("MCVRC") was originally formed as the Stephanie Roper Foundation and Committee after the kidnapping, rape, and murder of Stephanie Roper in 1982 and the treatment of her parents in the aftermath of crime.[2] MCVRC's mission is "To ensure that victims of crime receive justice and are treated with dignity and compassion through comprehensive victims' rights and services." 18 U.S.C. § 3771 is named in part to honor Stephanie Roper. (*See* Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act ("CVRA"), codified as Title I of the Justice For All Act of 2004). Since 2007, MCVRC has expanded its delivery of services and advocacy provided to include victims of identity theft and fraud through direct representation regarding their crime victims' rights in criminal cases, assistance with collateral civil consequences, as well as the training of law enforcement personnel and of pro bono attorneys.

The Identity Theft Resource Center ("ITRC") was originally formed as VOICES (Victims of Crimes

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Both petitioner and respondent were notified of the intention to file this brief prior to 10 days before the due date of the brief, and both petitioner and respondent have consented to the filing of this brief. Pursuant to Rule 37.3(a), *amici* filed the respondent's letter of consent with the Clerk of the Court contemporaneously with the filing of this brief. On December 12, 2008, the petitioner filed with the Court his "Consent to the filing of amicus briefs, in support of either party or neither party."

[2] *See* http://www.mdcrimevictims.org/_pages/d_about_mcv/d1_aboutmcv_intro.htm (last visited January 21, 2009).

Extended Services) in 1999 to support victims of identity theft in resolving their cases, and to broaden public awareness and understanding of identity theft. ITRC's long-standing mission has been "To provide best-in-class victim assistance at no charge to consumers throughout the United States." In addition to victim services, it is ITRC's on-going mission to educate consumers, corporations, government agencies and other organizations on best practices for fraud and identity theft detection, reduction, and mitigation.[3]

Texas Legal Services Center ("TLSC") is a nonprofit corporation whose mission is to improve the quality of advocacy and to expand the availability of legal assistance for low income individuals and organizations in the Southwest. For 30 years, TLSC has been a leading provider of legal services and support to Texans. TLSC operates three programs for crime victims including the Victims Initiative for Counseling, Advocacy, and Restoration of the Southwest ("VICARS") which serves victims of identity theft and financial fraud in Texas, Oklahoma, New Mexico, and Colorado. Since its inception, VICARS has provided direct legal services to over 600 victims of identity theft and has provided specialized training to law enforcement, attorneys, and victim advocates who assist identity theft victims.

The Identity Theft Action Council Of Nebraska was founded in 2006 by Jaimee Napp, an identity theft victim, who has used her journey as a basis to help

[3] *See* http://www.idtheftcenter.org (last visited January 27, 2009); http://www.idtheftcenter.org/artman2/publish/a_history/The_History_of_the_Identity_theft_Resource_Center.shtml (last visited January 27, 2009).

others and discuss systematic change.[4] The Identity Theft Action Council of Nebraska's mission is "To educate Nebraska consumers on identity theft and prevention, provide victims assistance with their recovery and advocate for consumers and victims on identity theft and privacy issues at the state and federal level."

The National Center for Victims of Crime ("National Center"), a non-profit organization headquartered in Washington, DC, is one of the nation's leading resource and advocacy organizations for all victims of crime. The mission of the National Center is to forge a national commitment to help victims of crime rebuild their lives. The National Center is dedicated to serving individuals, families, and communities harmed by crime. Among other things, the National Center advocates laws and policies that create resources and secure rights and protections for crime victims. The National Center's programs include the National Crime Victim Helpline, which provides information and referrals to victims of crime, including victims of identity theft. The National Center has a particular interest in this brief due to its work and dedication to the interests of victims of identity theft and fraud, and to the interest of all victims in receiving restitution for the harm that results from a criminal offense.

The National Crime Victim Law Institute ("NCVLI") is a nonprofit educational organization located at Lewis & Clark Law School, in Portland, Oregon. NCVLI's mission is to actively promote

[4] *See* http://www.idtheftne.org/about_us.html (last visited January 22, 2009).

balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training, technical assistance to attorneys, promotion of the National Alliance of Victims' Rights Attorneys, research and analysis of developments in crime victim law, and provision of information on crime victim law to crime victims and other members of the public. In addition, NCVLI actively participates as amicus curiae in cases involving crime victims' rights nationwide. This case involves fundamental rights of all crime victims, including the right to access justice.

All of the *amici* have a strong interest in ensuring that the laws enacted to protect victims whose identities have been misappropriated are properly interpreted and enforced.

SUMMARY OF ARGUMENT

This country is afflicted by an epidemic of identity theft. The harm suffered by victims of identity theft can be devastating.[5] In response to this epidemic, Congress has enacted statutes designed to increase penalties for identity theft and to ensure restitution for identity theft victims.

[5] *See, e.g.*, 149 Cong. Rec. S12739, S12746 (Oct. 16, 2003) (statement of Sen. Specter) ("[V]ictims spend an average of 600 hours recovering from identity theft crimes, sometimes spanning several years.... In addition to the lost time, victims spend an average of $1,400 in their efforts to rectify the damage inflicted by identity thieves...."); Russ Krebs, *Victim works to fix mess*, Fremont Tribune, January 24 - 25, 2009, http://www.fremonttribune.com/articles/2009/01/24/news/local/doc497a96debaeef725151811.txt.

Congress passed the Identity Theft Penalty Enhancement Act of 2004, codified at 18 U.S.C. § 1028A, in order, among other things, to provide additional punishment and deterrence for those who use false identities in the commission of crime. Subsequently, Congress passed the Identity Theft Enforcement and Restitution Act, codified in part at 18 U.S.C. § 3663(b)(6), in order to ensure that victims of offenses under Section 1028A(a) receive restitution for time spent repairing their lives.

Under Petitioner's misreading of Section 1028A(a)(1), innocent victims of identity theft would be deprived of their right to restitution unless the government could prove that the perpetrator knew the false identity actually belonged to another, specific person. Petitioner's reading should be rejected because it ignores the plain text of Section 1028A(a)(1), the Congressional intent behind Section 1028A(a)(1), and the interests of the victims that the statute was enacted to protect.

ARGUMENT

I. THE STATUTE IS NOT AMBIGUOUS: IT DOES NOT REQUIRE THAT A VIOLATOR KNOW THAT THE FALSE IDENTITY HE IS USING BELONGS TO ANOTHER PERSON.

In any case of statutory construction, the analysis should begin with the text of the statute, and, where that statute is unambiguous, the analysis need not go further. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (U.S. 1999) ("As in any case of statutory construction, our analysis begins with 'the

language of the statute.' . . .And where the statutory language provides a clear answer, it ends there as well.") (internal citation omitted).

In this case, the text of the relevant statute is not ambiguous:

> **§ 1028A. Aggravated identity theft**
>
> **(a) Offenses.--**
>
> **(1) In general.--**Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

18 U.S.C. § 1028A(a)(1). In turn, the predicate offenses enumerated in 1028A(c) (which must be committed in order for the statute to apply) include felony violations "relating to false personation of citizenship", "any provision contained in chapter 63 (relating to mail, bank, and wire fraud)," "any provision contained in chapter 69 (relating to nationality and citizenship)," "any provision contained in chapter 75 (relating to passports and visas)," "section 243 or 266 of the Immigration and Nationality Act," and "any provision contained in chapter 8 of title II of the Immigration and Nationality Act." *See* 18 U.S.C. § 1028A(c).

Thus, a person violates Section 1028A(a)(1) when, in addition to committing one of the predicate felonies specified by the statute, that person also

knowingly and unlawfully transfers, possesses, or uses a means of identification that belongs to another. The controversy at hand has arisen because the Petitioner contends that a conviction under Section 1028A(a)(1) requires proof that the offender knew that the false identity he was using belonged to another person. According to the Petitioner, this requirement is created as a result of the placement of the term "knowingly" in the statute.

However, the plain language of Section 1028A(a)(1) demonstrates that "knowingly" applies only to "transfers, possesses, or uses." Indeed, "knowingly" is only used once in the statute and only in connection with those verbs. This analysis is consistent with the reasoning employed by the Fourth Circuit when it addressed this identical question:

> We begin with grammar. The word "knowingly" in this case is an adverb that modifies the verbs "transfers, possesses, [and] uses." "Without lawful authority" is an adverbial phrase that also modifies these verbs. The direct object of these transitive verbs is "a means of identification," a nominal phrase that is further modified by the adjectival prepositional phrase "of another person." Together, "transfers, possesses, or uses . . . a means of identification of another person" forms a predicate.

> We think that, as a matter of common usage, "knowingly" does not modify the entire lengthy predicate that follows it. Simply placing "knowingly" at the start of this long predicate does not transform it into a modifier of all the words that follow. Good usage requires that the limiting modifier, the adverb "knowingly," be as close as possible to the words which it modifies, here, "transfers, possesses, or uses."

United States v. Montejo, 442 F.3d 213, 215 (4th Cir. 2006), *cert. denied*, 549 U.S. 879 (2006). Based on this reasoning, the Fourth Circuit arrived at the conclusion that Section 1028A(a)(1) unambiguously does not require proof that the violator knew the false identity he or she was using belonged to another person. *See Montejo*, 442 F.3d at 217.

This same result has been reached by multiple other circuits in their analysis of this statute, as well. *See United States v. Hurtado*, 508 F.3d 603, 609 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 2903 (2008) ("The fact that the word 'knowingly' - an adverb - is placed before the verbs 'transfers, possesses, or uses' indicates that 'knowingly' modifies those verbs, not the later language in the statute."); *United States v. Mendoza-Gonzalez*, 520 F.3d 912, 915 (8th Cir. 2008), *petition for cert. pending*, No. 08-5316 (filed July 15, 2008) ("[T]he plain language of § 1028A(a)(1) limits 'knowingly' to modifying 'transfers, possesses, or uses' and not 'of another person.' Thus . . . § 1028A(a)(1) is unambiguous . . . the Government was not required to prove that Mendoza-Gonzalez knew that Gurrola was a real person . . . ."). These findings comport with

well-established principles of statutory construction. *See, e.g., United States v. Jones*, 471 F.3d 535, 539 (4th Cir. 2006) ("Adverbs generally modify verbs, and the thought that they would typically modify the infinite hereafters of statutory sentences would cause grammarians to recoil.").

Further, restricting use of the term "knowingly" to the verbs does not lead to an absurd result, whereas extending "knowingly" to every part of Section 1028A(a)(1) would produce a nonsensical result. A defendant could avoid the law if he did not know, or the government could not prove that he knew, that his victim was an actual person, regardless of the havoc his use of the identity caused the victim.

Finally, extending the term "knowingly" to each element of the offense would require reading language into the statute that is simply not there—because Congress chose not to add such language, courts should not make such additions, either:

> If Congress had intended to extend the knowledge requirement to other portions of this subsection, it could have drafted the statute to prohibit the knowing transfer, possession, or use, without lawful authority, of the means of identification "known to belong to another actual person." An extension of the knowledge requirement to the phrase "of another person" in § 1028A(a)(1), as advocated by Hurtado, would allow a defendant to use the identification of another person fraudulently in the commission of another enumerated

> felony so long as the defendant remains ignorant of whether that other person is real. The plain language of § 1028A(a)(1) does not dictate such a reading.

United States v. Hurtado, 508 F.3d at 609.

Thus, for the foregoing reasons, the plain text of the statute unambiguously does not require violators to know that the false identities they have used belong to actual persons.

II. EVEN IF THE TEXT OF THE STATUTE WERE AMBIGUOUS, ANY SUCH AMBIGUITY WOULD BE CLARIFIED BY LEGISLATIVE HISTORY AND CONGRESSIONAL INTENT.

Even if the statute were ambiguous (which it is not), the next step would be to look to Congressional history and intent to clarify any such ambiguity. *See, e.g., Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (U.S. 1985) ("Because we find the statute ambiguous on its face, we seek guidance in the statutory structure, relevant legislative history, [and] congressional purposes . . . ."); *United States v. Hohri*, 482 U.S. 64, 71 (U.S. 1987) ("Because the statute is ambiguous, congressional intent is particularly relevant to our decision."); *Toibb v. Radloff*, 501 U.S. 157, 162 (U.S. 1991) ("[A] court appropriately may refer to a statute's legislative history to resolve statutory ambiguity."). An examination of Congressional intent and history with respect to Section 1028A(a)(1) leaves no doubt that the knowledge requirement advocated by the Petitioner was never contemplated by Congress and, in fact,

would directly contravene the legislative purposes behind Section 1028A(a)(1).

A. The Accompanying Restitutionary Statute Reflects Congressional Understanding That There Is No Requirement That An Offender Under Section 1028A(a) Knows He Is Harming Another Person.

After the enactment of Section 1028A(a), Congress enacted 18 U.S.C. § 3663(b)(6), which allows the victims of offenders under Section 1028A(a) to receive restitution. It states as follows:

> The [restitution] order may require that such defendant—
>
> . . . .
>
> (6) in the case of an offense under sections 1028(a)(7) or 1028A(a) of this title [18 USCS §§ 1028(a)(7) or § 1028A(a)], pay an amount equal to the value of the time reasonably spent by the victim in an attempt to remediate the **intended or actual harm** incurred by the victim from the offense.

18 U.S.C. § 3663(b) (emphasis added).

Use of the phrase "intended **or** actual harm" (and not "intended **and** actual harm") evidences Congressional understanding that a violation of 1028A(a) may result in **unintended harm to victims.** If Congress understood that 1028A(a)(1) could be violated only if the offender knew he was using an identity that belonged to another person, Congress

would not have written the corresponding restitutionary statute in this open-ended fashion to incorporate all types of "actual harm."

Further, Section 3663(b)(6) and its reference to "intended or actual harm" resulting from a violation of Section 1028A(a) eviscerates the Petitioner's purported distinction between "intentional theft" (which, according to Petitioner, Section 1028A(a)(1) is intended to punish) and "accidental misappropriation" (which, according to Petitioner, Section 1028A(a)(1) is not intended to punish). *See, e.g.,* Brief for the Petitioner, p. 5 ("As its name suggests, the 'Aggravated identity theft' statute punishes an especially serious form of stealing. . . . [T]here is an important difference between accidental misappropriation and intentional theft."). If Congress intended, or understood, Section 1028A(a)(1) to operate as the Petitioner contends, Section 3663(b)(6) would not have been written to reference "intended or actual harm" resulting from violations of Section 1028A(a).

B. Petitioner's Reading of Section 1028A(a)(1) Would Undermine Congressional Intent to Assist Victims Via Section 3663(b)(6).

The combination of Section 1028A(a) and Section 3663(b)(6) establishes a coherent statutory scheme in which innocent victims whose identities have been misappropriated can recover for the lost value of time that those victims must spend restoring their good names and reputations. *See* 18 U.S.C. § 3663(b)(6) (in the case of an offense under 1028A(a), victim can receive restitution for "an amount equal to the value of the time reasonably spent by the victim in

an attempt to remediate the intended or actual harm incurred by the victim from the offense."). Under the Petitioner's reading of Section 1028A(a)(1), significant numbers of victims would lose their restitutionary rights solely because the felons using their identities happened to lack the specific knowledge that the identities were assigned to real persons.

1. The Congressional Record with Respect to 1028A(a) Is Replete with References to the Harms Suffered by Victims Whose Identities Have Been Misappropriated.

It is clear from the Congressional record that section 1028A was enacted out of concern for the victims of identity theft:

> The Federal Trade Commission received 161,819 complaints of someone using another's information in 2002. In 2003 the FTC performed a random sampling of households. The results from the survey suggest that almost 10 million Americans were the victim of some form of ID theft within the last year . . . .

150 Cong. Rec. H4808, H4809 (June 23, 2004) (statement of Rep. Sensebrenner).

The enormous costs suffered by these victims were described as follows:

> Identity theft has now topped the list of consumer complaints filed with the FTC for the last 4 years in a row, impacting millions of Americans and costing consumers and businesses billions of dollars.

> My home State of California ranks number three in the number of victims of identity theft per capita with over 37,000 complaints reported by consumers, costing over $40 million just last year alone. Nationally, California cities crowd the top ten list of metropolitan areas with the highest per capita rates of identity theft reported. The Los Angeles-Long Beach metropolitan area, which includes my district, is particularly prone to such crimes and ranks number two nationally with over 13,000 victims.
>
> **A victim of identity theft usually spends a year and a half working to restore his or her identity and good name.** Many of my constituents have contacted me. Many of my colleagues have heard similar urging that Congress act quickly and effectively to crack down on this growing epidemic.

150 Cong. Rec. H4808, H4810 – 11 (June 23, 2004) (statement of Rep. Schiff) (emphasis added).

2. The Harms Referenced in the Congressional Record for Section 1028A(a) Were Targeted by the Restitutionary Provision at Section 3663(b)(6).

As noted *supra*, after the enactment of Section 1028A(a), Congress enacted Section 3663(b)(6) as a restitutionary mechanism specifically designed to compensate victims for the lost value of time spent remediating the damage caused by the misappropriation of their identities:

> The [restitution] order may require that such defendant--
>
> . . . .
>
> (6) in the case of an offense under sections 1028(a)(7) or 1028A(a) of this title [18 USCS §§ 1028(a)(7) or 1028A(a)], pay an amount equal to the **value of the time reasonably spent by the victim** in an attempt to remediate the intended or actual harm incurred by the victim from the offense.

18 U.S.C. § 3663(b)(6) (emphasis added). Thus, the Congressional record for Section 1028A expressed concern with respect to the time lost by victims of identity theft in restoring their good names, and Section 3663(b)(6) directly and specifically allows restitution for the value of that time.

3. Petitioner's Reading of Section 1028A(a)(1) Would Lead to the Arbitrary (and Absurd) Result that the Restitutionary Rights of Victims Will Be Contingent on Whether the Offender Happened to Know that the False Identity Belonged to Another Person.

If Petitioner's reading of Section 1028A(a)(1) is accepted, then a large percentage of the very group of victims that Congress intended to protect through Section 1028A(a) and Section 3663(b)(6) will be deprived of restitutionary rights. More specifically, under Petitioner's reading of Section 1028A(a)(1), a victim's right to restitution under Section 3663(b)(6) would be revoked as long as the accused offender under Section 1028A(a)(1) did not know that the fake identity he was using belonged to another person. As such, Petitioner's reading of Section 1028A(a)(1) subverts the Congressional purpose of helping the innocent victims who have spent significant amounts of time restoring their identities.[6]

Further, the absurdity of the position that a victim's right to restitution should be contingent on whether the offender happened to know the false identity he was using belonged to another person cannot be ignored—the havoc wrecked on the victim's life is the same either way. The absurdity of the

[6] It should also be noted that relief would not be available under Section 3663(b)(6) via Section 1028(a)(7) either, for Petitioner's interpretation would apply to that statute in the same way. *See* 18 U.S.C. § 1028(a)(7) (applies to an offender who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person . . . .").

Petitioner's position is perhaps best illustrated by an example:

> **Scenario 1:** Offender A purchases an identity card from a third party. The identity card contains Victim B's personal information. The third party informs Offender A that Victim B is a real person. Before Offender A is apprehended, he has caused minor damage, requiring Victim B to spend 20 hours remediating the harm caused by Offender A's misappropriation of the identity. **Result Under Petitioner's Reading Of Section 1028A(a)(1):** Violation under Section 1028A(a)(1), and victim is entitled to restitution under Section 3663(b)(6).
>
> **Scenario 2:** Offender A purchases an identity card from a third party. The identity card contains Victim B's personal information. The third party does **not** inform Offender A that Victim B is a real person. Before Offender A is apprehended, he has caused significant damage, requiring Victim B to spend 200 hours remediating the harm caused by Offender A's misappropriation of the identity. **Result Under Petitioner's Reading Of Section 1028A(a)(1):** No violation under Section 1028A(a)(1), and **victim is not entitled to restitution under Section 3663(b)(6).**

Thus, depending on whether a third party notifies the offender that the fake identity belongs to another, the innocent victim (who, in both cases, has done absolutely nothing wrong) could have his restitutionary rights under Section 3663(b)(6) erased. Any reading that leads to such arbitrary results subverts the Congressional intent evidenced by the legislative record for Section 1028A(a) and enactment of Section 3663(b)(6).

C. Further, It Also Cannot Be Ignored that the Congressional Record Specifically References the Very Conduct in which Petitioner Was Engaged.

The Congressional record with respect to Section 1028A(a) expressly references the use of false identification by illegal immigrants:

> Mr. Speaker, unfortunately, the mentions of ID theft are becoming all too commonplace. . . . In Collin County, Texas, a former Texas driver's license bureau clerk pleaded guilty **to selling ID cards to illegal immigrants using stolen information from immigration papers.**

150 Cong. Rec. H4808, H4810 (June 23, 2004) (statement of Rep. Carter) (emphasis added). *See also* H.R. Rep. 108-528, *4 (2004), U.S.C.C.A.N. 779, 780. ("The terms 'identity theft' and 'identity fraud' refer to all types of crimes in which someone wrongfully obtains and uses another person's personal data in some way that involves fraud or deception, typically for

economic or other gain, **including immigration benefits.**") (emphasis added).

These conduct descriptions in the Congressional record plainly include scenarios in which the ultimate user of the false identification will not know whether the identity belongs to another real person. More specifically, when an illegal immigrant purchases a false ID card from a third party, that illegal immigrant has no knowledge of whether that false ID is connected to a real person. This observation was even made in one of the decisions relied on by the Petitioner:

> [T]he definition of "identity theft" given in the House Report encompasses the use of false identification to receive immigration benefits. Id. at 4, 2004 U.S.C.C.A.N. at 780. **If an undocumented immigrant purchases a social security number from a third party and uses that number to obtain employment, he or she may not know that it is assigned to another person. The third party may know that the number is a valid number, assigned to a real person, but the immigrant may not.**

United States v. Godin, 534 F.3d 51, 60 (1st Cir. 2008) (emphasis added). Thus, even decisions that ostensibly support the Petitioner's position acknowledge that the Congressional record reflects an intent that Section 1028A(a)(1) should apply to perpetrators who do not necessarily know they are using the identity of another person. This reflection of Congressional intent, in itself, should terminate the analysis.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

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AMICUS CURIAE BRIEF

114

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IN THE

Supreme Court of the United States

IGNACIO FLORES-FIGUEROA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AND THE UNITED STATES HISPANIC CHAMBER OF COMMERCE AS *AMICI CURIAE* ON BEHALF OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES iii

STATEMENT OF INTEREST OF *AMICUS CURIAE* THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND ("MALDEF") 1

STATEMENT OF INTEREST OF *AMICUS CURIAE* THE UNITED STATES HISPANIC CHAMBER OF COMMERCE ("USHCC") 2

SUMMARY OF ARGUMENT 3

ARGUMENT 5

POINT I

RESOLUTION OF AMBIGUITY IN 18 U.S.C. § 1028A(a)(1) IN FAVOR OF PETITIONER WILL AVOID ANOMALOUS RESULTS IN THE SENTENCING OF SIMILARLY SITUATED DEFENDANTS 5

Contents

Page

POINT II

RESOLUTION OF AMBIGUITY IN 18 U.S.C. § 1028A(a)(1) IN FAVOR OF PETITIONER WILL BE CONSISTENT WITH THE APPROACH ADOPTED BY CONGRESS TO ADDRESS VARYING DEGREES OF CULPABILITY RELATING TO THE USE OF FALSE DOCUMENTS 7

CONCLUSION 14

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

McBoyle v. United States,
283 U.S. 25 (1931) 3

United States v Bass,
404 U.S. 336 (1971) 7

United States v. Godin,
No. 07-2332, 2008 WL 2780646
(1st Cir. July 18, 2008) 11

United States v. Hurtado,
508 F.3d 603 (11th Cir. 2007),
cert. denied, 128 S. Ct. 2903 (2008) 8, 10

United States v. Mendoza-Gonzalez,
520 F.3d 912 (8th Cir. 2008) 7-8, 9

United States v. Miranda-Lopez,
No. 07-50123, 2008 WL 2762392
(9th Cir. July 17, 2008) 11

United States v. Montejo,
442 F.3d 213 (4th Cir. 2006) 7, 8, 9

United States v. Universal C.I.T. Credit Corp.,
344 U.S. 218 (1952) 7

United States v. Villanueva-Sotelo,
515 F.3d 1234 (D.C. Cir. 2008) 11, 14

Cited Authorities

Page

FEDERAL STATUTES

18 U.S.C. § 1015(e) 9

18 U.S.C. § 1028A(a)(1) ..... *passim*

18 U.S.C. § 1546(a) 8, 9

18 U.S.C. § 1546(b)(1) 9

42 U.S.C. § 408(a)(7)(B) 8, 9

OTHER AUTHORITIES

United States Sentencing Commission, Guidelines Manual

§ 2B1.1 12

§ 2L2.2 12

§ 2L2.2(b) 12

Appendix A 11-12

Sentencing Table 12

FAR Case 2007-13, Employment Eligibility Verification, 73 Fed. Reg. at 33,379 13

This *amicus curiae* brief is submitted on behalf of the Mexican American Legal Defense and Educational Fund ("MALDEF") and the United States Hispanic Chamber of Commerce ("USHCC") in support of Petitioner.[1]

STATEMENT OF INTEREST OF *AMICUS CURIAE* THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND ("MALDEF")

MALDEF is a national civil rights organization established in 1968. Its principal objective is to promote the civil rights and equality of treatment of Latinos living in the United States. MALDEF's mission includes a commitment to pursuing political and civil equality and opportunity through advocacy, community education, and the courts. MALDEF therefore has an interest in the fair, predictable, and even-handed interpretation and enforcement of the nation's criminal laws.

[1] Pursuant to Supreme Court Rule 37.3(a), the *Amici Curiae* state that the parties have consented to the filing of this brief and that letters of consent have been filed in the office of the Clerk. Pursuant to Supreme Court Rule 37.6, the *Amici Curiae* state that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. *Amici Curiae* further state that no one other than MALDEF, USHCC, and their counsel made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF INTEREST OF *AMICUS CURIAE* THE UNITED STATES HISPANIC CHAMBER OF COMMERCE ("USHCC")

USHCC is the nation's largest business chamber that focuses on the needs and issues of Hispanic-owned businesses, employees and consumers. USHCC's membership includes companies and professional organizations of every size, in every industry sector, and from every region of the United States and Puerto Rico. Founded in 1979, the USHCC actively promotes the economic growth and development of Hispanic entrepreneurs and represents the interests of more than 2.5 million Hispanic-owned businesses in the United States and Puerto Rico that generate in excess of $388 billion annually to the American economy. It also serves as the umbrella organization for local, regional and statewide Hispanic chambers in the United States, Puerto Rico, Canada, Mexico, and South America.

The USHCC has a direct interest in this case for several reasons. First, Hispanic employers and Hispanic employees play a significant role in the American economy. Hispanics are the largest minority group in the United States with an estimated population of over 41.3 million. Hispanics are the largest minority group in over 26 states, and they are estimated to grow by more than 1.7 million per year. (U.S. Census Bureau Data of 1970, 1990, 2000, 2004; Pew Hispanic Center, March 2004; Tomas Rivera Policy Institute.) Among minority groups, Hispanics continue to own the most companies, and by 2010, Hispanics will own 3.2 million companies and generate in excess of $465 million in revenues. (United States Small Business

Administration; HispanTelligence.) Hispanics also account for over 13 percent of the documented U.S. labor force and are expected to increase to 20 percent by 2030. (HispanTelligence.)

If the decision below is affirmed, Hispanic employers will face an unstable workforce. Most employers do not knowingly employ illegal aliens. All employers, including Hispanic employers, are potentially subject to investigations and possibly raids that can significantly impact their operations and create a drastic impact on the economy if employees caught up in those investigations and raids are prosecuted for aggravated identity theft in circumstances like that at issue here.

SUMMARY OF ARGUMENT

When Justice Oliver Wendell Holmes applied the rule of lenity in *McBoyle v. United States*, 283 U.S. 25, 27 (1931), he wrote:

> [a]lthough it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.

Only if 18 U.S.C. § 1028A(a)(1) is read to require that a defendant actually know that the means of identification transferred, possessed or used is that of another person will the line drawn by the law be clear, and its warning fair.

If 18 U.S.C. § 1028A(a)(1) instead is read to permit conviction for aggravated identity theft regardless of whether a defendant knows that the means of identification at issue belongs to another real person, the law will have radically different applications to persons engaging in essentially the same activity.

Should this Court conclude that 18 U.S.C. § 1028A(a)(1) is ambiguous, it should apply the rule of lenity. Application of the rule is particularly appropriate in this case because the criminal statute at issue creates a category of aggravated offense based on the commission of a predicate felony, and then imposes a mandatory two-year consecutive sentence for that aggravated offense that in many instances far exceeds the sentence imposed for commission of the predicate crime. As is demonstrated in the brief of *Amici* Advocates for Human Rights, *et al.*, the weight of 18 U.S.C. § 1028A(a)(1) frequently falls on undocumented aliens. Yet, such a result is at odds with the far more flexible and nuanced scheme to address the use of false documents that Congress created within the framework of the body of law relating to citizenship and legal resident status.

ARGUMENT

POINT I

RESOLUTION OF AMBIGUITY IN 18 U.S.C. § 1028A(a)(1) IN FAVOR OF PETITIONER WILL AVOID ANOMALOUS RESULTS IN THE SENTENCING OF SIMILARLY SITUATED DEFENDANTS

The Eighth Circuit's reading of 18 U.S.C. § 1028A(a)(1) results in very different punishments being meted out to people who have engaged in essentially the same activity. For example, twin brothers could purchase forged Permanent Resident cards from an individual in Chicago, as Petitioner did in this case, go to work at a steel plant, as Petitioner did in this case, and become the subject of a U.S. Immigration and Customs Enforcement ("ICE") investigation, as Petitioner was in this case. If brother #1 happened to have purchased and used a Permanent Resident card that bore a number that had never been issued to someone else, he would not be charged with aggravated identity theft. But if brother #2, who purchased his forged card on the same day and from the same person as brother # 1, and who worked alongside brother #1 in the steel plant, happened to have purchased a card that bore a number that had been issued to some other real person, under the reading of 18 U.S.C. § 1028A(a)(1) adopted by the Eighth Circuit, he would be charged with aggravated identity theft and, if convicted, would be sentenced to a term of imprisonment two years longer than that imposed on his twin.

The anomalous and inconsistent results that flow from the Eighth Circuit's reading of 18 U.S.C. § 1028A(a)(1)

are further illustrated by the case at bar. Mr. Flores-Figueroa worked at L & M Steel Services, Inc. for six years using a false Social Security number that had never been issued to anyone (and a name that was not his own). *Brief for Petitioner ("Pet. Br.")* at 3 – 4. In 2006, when he decided that he would like to work under his own name, he purchased a second forged Social Security card bearing his own name and a new number. *Pet. Br.* at 4. Unfortunately for Mr. Flores-Figueroa, unknown to him, the number on this new Social Security card had been assigned to another real person. *Id.* Therefore, after ICE conducted its investigation, Mr. Flores-Figueroa was charged with having violated 18 U.S.C. § 1028A(a)(1), and was ultimately convicted and sentenced for that offense. Had Mr. Flores-Figueroa continued to use the false Social Security number with which he had commenced his employment, he could not have been charged with aggravated identity theft since that Social Security number had never been assigned to another real person. His sentence, had he been arrested while still using his first Social Security number, would have been two years shorter.[2] Ironically, then, the attempt by Mr. Flores-Figueroa to work under his own name, rather than a name that was not his own, led to his being charged with aggravated identity theft.[3]

[2] The record does not disclose whether the Resident Alien number Mr. Flores-Figueroa used when he was first employed ever had been issued to a real person, but the Government did not allege that it had. *Pet. Br.* at 3, n. 1

[3] The other irony here is that, unlike the typical identity thief, a defendant like Mr. Flores-Figueroa has an interest in using false identification that has never been assigned to any real person, rather than the reverse.

It has long been recognized that there is an "instinctive distaste against men languishing in prison unless the lawmaker has clearly said that they should." H. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks, 196, 209 (1967), quoted approvingly in *United States v Bass*, 404 U.S. 336, 348 (1971). Surely, if Congress had intended the harsh anomaly that results from the Eighth Circuit's reading of § 1028A(a)(1) it would have declared its intention in "language that is clear and definite." *United States v. Universal C.I.T. Credit Corp.*, 344 U. S. 218, 222 (1952). Since it did not, all ambiguity in the statute must be resolved in favor of Petitioner. *Id.*

POINT II

RESOLUTION OF AMBIGUITY IN 18 U.S.C. § 1028A(a)(1) IN FAVOR OF PETITIONER WILL BE CONSISTENT WITH THE APPROACH ADOPTED BY CONGRESS TO ADDRESS VARYING DEGREES OF CULPABILITY RELATING TO THE USE OF FALSE DOCUMENTS

The reading of § 1028A(a)(1) adopted by the Eighth Circuit not only leads to the anomalous results discussed above. It also has profound impact on the terms of imprisonment imposed on defendants. This is perhaps best illustrated by the Fourth, Eighth, and Eleventh Circuit decisions now familiar to this Court because they are the decisions that present the conflict with the First, Ninth, and D. C. Circuits on the question before the Court: *United States v. Montejo*, 442 F.3d 213 (4th Cir. 2006); *United States v. Mendoza-Gonzalez*, 520 F.3d 912

(8th Cir. 2008), *petition for cert. filed* (U.S. July 15, 2008) (No. 08-5316); *United States v. Hurtado*, 508 F.3d 603 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 2903 (2008). In each of these three cases, the total sentence imposed was six months for the predicate felonies and two years for aggravated identity theft, premised on commission of those predicate felonies.

In *Montejo*, 442 F.3d 213, the defendant pleaded guilty to one count of possession of a false immigration document (in violation of 18 U.S.C. § 1546(a)) and one count of false representation of a social security number (in violation of 42 U.S.C. § 408(a)(7)(B)). He moved to quash the count of the indictment that charged him with violation of 18 U.S.C. § 1028A(a)(1), asserting that while he knew that the numbers on the cards he had obtained were false and did not belong to him, he did not know that the numbers in fact had been assigned to other real people. The motion was denied.

Thereafter, Mr. Montejo was tried on the count of aggravated identity theft based on stipulated facts. It was agreed that Mr. Montejo had walked into the United States from Mexico and that he had purchased a Resident Alien card and a Social Security card in Phoenix, Arizona for $60.00. The Resident Alien card bore his photo and a fabricated number. The Social Security card bore his name along with a fabricated number. As stated by the Court of Appeals,

> [i]t turned out that, unknown to Montejo, the Alien Registration number that Montejo provided [to his employer] had been assigned to a Tanzanian man . . . who by that time had

> become a naturalized U.S. citizen. Likewise, the Social Security number used by Montejo had actually been assigned to another person, though the rightful owner is not named.

442 F.3d at 214. The trial court convicted Mr. Montejo of violating 18 U.S.C. § 1028A(a)(1), concluding, in a judgment affirmed by the Fourth Circuit, that it was not necessary for the Government to prove that Mr. Montejo knew that the means of identification at issue belonged to another real person. Mr. Montejo was sentenced to six months' imprisonment on each of the two predicate felonies and two years' imprisonment for aggravated identity theft (as well as supervised release and special assessments). *Id.* at 215.

The defendant in *Mendoza-Gonzalez*, 520 F.3d 912, was sentenced to a total of 30 months in prison: six months' imprisonment on four separate counts of using false documents and making false statements, with all four sentences to run concurrently, followed by a consecutive twenty-four month sentence for aggravated identity theft. In July 2006, Mr. Mendoza-Gonzalez had applied for work in a pork processing plant in Iowa using an identification card in the name of Dinicio Gurrola. Late in 2006, ICE conducted a raid at the plant. Mr. Mendoza-Gonzalez was interviewed and arrested. He was charged with making a false claim of citizenship in violation of 18 U.S.C. § 1015(e), using false identification documents in violation of 18 U.S.C. § 1546(b)(1), using fraudulently obtained immigration documents in violation of 18 U.S.C. § 1546(a), and making a false representation of a social security number in violation of 42 U.S.C.§ 408(a)(7)(B), as well as aggravated identity theft.

A jury convicted Mr. Mendoza-Gonzalez of all counts. After he was sentenced, he appealed only the conviction for aggravated identity theft, arguing, *inter alia*, that 18 U.S.C. § 1028A(a)(1) required the Government to prove beyond a reasonable doubt that he had had actual knowledge that the identification he had used belonged to an actual person, and that the Government had failed to meet its burden. The Eighth Circuit affirmed the conviction, resulting in Mr. Mendoza-Gonzalez being sentenced to an additional 24 months in prison beyond the six months that he was to serve concurrently for the four separate predicate offenses.

In *Hurtado*, 508 F.3d 603, the defendant was found guilty of four counts of making false statements and falsely representing himself as a United States citizen and two counts of aggravated identity theft. He was sentenced to a total of 30 months in prison: six months' imprisonment on the first four counts, to be served concurrently, and 24 months of imprisonment for aggravated identity theft, to be served consecutively to the sentences on the first four counts. Mr. Hurtado had applied for a passport using as supporting identification a birth certificate and a driver's license in the name of Marcos Colon. He had paid $1500 to an individual in Boston for the birth certificate and social security card. On appeal, Mr. Hurtado challenged only the convictions for identity theft. The Eleventh Circuit held that 18 U.S.C. § 1028A(a)(1) does not require that the Government prove that a defendant knew that the means of identification he possessed and used belonged

to another actual person. It therefore affirmed the conviction.[4]

The fact that the sentences for the predicate felonies were six months long in each of the three cases discussed above presumably reflects consistent application of the Sentencing Guidelines to those felonies when the defendant is a first-time offender. Under the Guidelines, these predicate felonies generally are characterized as base level 6 or base level 8 felonies.[5] The applicable

[4] While the relationship between the sentences for the predicate felonies and for the crime of aggravated identity theft are not so disparate as those discussed above in the other cases that create the circuit conflict with respect to the question before this Court, the sentence for aggravated identity theft, particularly because the statute mandates that the sentence be both of 24 months' duration and consecutive, does add substantially to the total sentence imposed. In the case at bar, almost 1/3 of the total sentence is attributable to the conviction for aggravated identity theft: Mr. Flores-Figueroa received a sentence of 75 months' imprisonment: 24 months for aggravated identity theft, and 51 months for misuse of immigration documents and entry without inspection. In *United States v. Miranda-Lopez*, No. 07-50123, 2008 W. L. 2762392 (9th Cir. July 17, 2008), defendant was sentenced to 39 months for unlawful entry and an additional 24 months for aggravated identity theft. The length of the sentences is not referenced in the circuit court opinions in *United States v. Villanueva-Sotelo*, 515 F.3d 1234 (D.C. Cir. 2008), and *United States v. Godin*, No. 07-2332, 2008 WL 2780646 (1st Cir. July 18, 2008).

[5] For ease of reference, all citations to the United States Sentencing Commission, Guidelines Manual ("USSG") referenced in this paragraph are grouped in this footnote. The portions of the Guidelines Manual applicable to the predicate

(Cont'd)

sentence for a first conviction at such levels is zero to six months. Significantly, the Sentencing Guidelines provide for increases of offense levels and concomitantly increased sentences if certain additional characteristics exist. For example, the level is increased by two, and the sentence potentially doubled to 12 months, if a defendant is an unlawful alien who previously had been deported or if he previously was convicted for a felony immigration offense. Additionally, the offense level and sentence will be further increased if, for example, a defendant fraudulently obtained a United States passport. In the cases of Messrs. Montejo, Mendoza-Gonzalez, and Hurtado, it appears that none of these or any other additional characteristics existed. The sentences imposed for the predicate felonies therefore did not exceed six months. Notwithstanding the absence of any of the additional characteristics enumerated in the Sentencing Guidelines, each was sentenced to an additional 24 months' imprisonment because the means of identification used in connection with the commission of the predicate felony happened to bear a number that had been assigned to another real person and the defendant therefore was held to have committed aggravated identity theft.

The impact of a conviction for aggravated identity theft does not fall solely on a defendant and his family,

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felonies in issue are set forth in USSG, App. A. The sentences are discussed in USSG §§ 2B1.1 and 2L2.2. The additional offense characteristics giving rise to increased levels and sentences are set forth at § 2L2.2(b). The Sentencing Table appears at USSG p. 396 (Nov. 1, 2008).

significant as that may be. It also has ramifications for employers. Employers have an interest in a stable workforce. As the federal government itself has recognized, "Given the vulnerabilities in the 1-9 system, many employers that do not knowingly employ illegal aliens nevertheless have unauthorized workers, undetected in their workforce." FAR Case 2007-13, Employment Eligibility Verification, 73 Fed. Reg., at 33, 379. In the event of an ICE investigation or raid, the effect on the stability of a workforce can be dramatic if undocumented workers are prosecuted for aggravated identity theft as well as document fraud. The Postville, Iowa prosecutions described in the brief of *Amici* Advocates for Human Rights, *et al.* offer compelling evidence on this point. In that case, prosecutors typically offered defendants who had used fraudulent documents that did not bear the names or identification numbers of other actual people probation but they insisted on prison terms in plea bargains with those defendants who had used documents that bore the names or identification numbers of other actual people – regardless of whether the defendants knew they had used a means of identification of another real person.[6] Brief of *Amici* Advocates for Human Rights, *et al.* at 15.

[6] In fashioning the nation's immigration laws, Congress has made paths to relief from removal (and continued participation as part of a stable workforce) available to people convicted of false document offenses so long as those offenses are not aggravated felonies and do not involve moral turpitude. See Brief of *Amici* Advocates for Human Rights, *et al.* at Point II B. Conviction for aggravated identity theft would bar such relief.

Such disparate outcomes, which bear little or no relationship to an individual defendant's degree of culpability, will be avoided if this Court applies the rule of lenity to any ambiguity it finds in 18 U.S.C. § 1028A(a)(1). Resolution in favor of Petitioner also will be consistent with the overall scheme adopted by Congress to address different degrees of culpability relating to the use of false documents.

CONCLUSION

The Government's reading of 18 U.S.C. § 1028A(a)(1) turns that statute into the equivalent of a game of chance: if a person purchases and uses a Social Security number or other means of identification that was never issued to another real person, he cannot be prosecuted for aggravated identity theft, but if the number he receives happens to have been issued to another real person, he will be. As stated by the District Court in *Villanueva-Sotelo*, 515 F.3d at 1249:

> [C]ommon sense tells us that a defendant ought not receive two additional years of incarceration for picking one random number rather than another – unless, of course, Congress has made clear that he should. Put another way, it's only common sense to conclude that conviction under an identity theft statute requires actual theft.

The rule of lenity supports this common sense result.

For the foregoing reasons, *Amici* urge the court to answer the question presented, "yes," and to reverse the decision of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

114

(8)

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

INTERESTS OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THIS COURT SHOULD ADOPT THE MODEL PENAL CODE RULE THAT A SPECIFIED *MENS REA* REQUIREMENT EXTENDS TO ALL MATERIAL ELEMENTS OF A STATUTE UNLESS A CONTRARY PURPOSE PLAINLY APPEARS 3

II. THE RULE OF LENITY REQUIRES READING THE STATUTE TO REQUIRE KNOWLEDGE OF ALL ELEMENTS OF THE CRIME 16

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases

Arthur Andersen LLP v. United States,
544 U.S. 696 (2005) 17

Bell v. United States,
349 U.S. 81 (1955) 18

Bifulco v. United States,
447 U.S. 381 (1980) 18

Bryan v. United States,
524 U.S. 184 (1998) 12

Commonwealth v. Scolieri,
813 A.2d 672 (Pa. 2002)..... 8

Crandon v. United States,
494 U.S. 152 (1990) 17

Gall v. United States,
552 U.S. , 128 S. Ct. 586 (2007)..... 19

Gibson v. State,
643 N.E.2d 885 (Ind. 1994) 8

Harmelin v. Michigan,
501 U.S. 957 (1991) 20

Holloway v. United States,
526 U.S. 1 (1999) 6, 20

Ladner v. United States,
358 U.S. 169 (1958) 18

Lambert v. California,
355 U.S. 225 (1957) 11

TABLE OF AUTHORITIES
(continued)

Page(s)

Landgraf v. USI Film Prods.,
511 U.S. 244 (1994) 7

Liparota v. United States,
471 U.S. 419 (1985) ..... passim

Louallen v. State,
778 N.E.2d 794 (Ind. 2002) 9

McBoyle v. United States,
283 U.S. 25 (1931) 12

People v. Benzor,
100 P.3d 542 (Colo. App. 2004) 8, 9

People v. Tombs,
697 N.W.2d 494 (Mich. 2005) 9

Ratzlaf v. United States,
510 U.S. 135 (1994) 6, 17

Rewis v. United States,
401 U.S. 808 (1971) 16

Riegel v. Medtronic, Inc.,
552 U.S. , 128 S. Ct. 999 (2008) 7

Safeco Ins. Co. of Am. v. Burr,
127 S. Ct. 2201 (2007) 6

Scheidler v. Nat'l Org. for Women, Inc.,
537 U.S. 393 (2003) 6

Staples v. United States,
511 U.S. 600 (1994) 12

TABLE OF AUTHORITIES
(continued)

Page(s)

State v. Cabans-Salgado,
92 P.3d 421 (Ariz. Ct. App. 2004) 9

State v. Gaylord,
890 P.2d 1167 (Haw. 1995) 8

State v. Hopkins,
873 S.W.2d 911 (Mo. Ct. App. 1994) 8

State v. Lundgren,
1994 WL 171657 (Ohio Ct. App. Apr. 22, 1994) 9

State v. Worthy,
746 A.2d 1063 (N.J. Super. Ct. App. Div. 2000) 8

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.,
128 S. Ct. 761 (2008) 15

United States v. Aguilar,
515 U.S. 593 (1995) 17

United States v. Bailey,
444 U.S. 394 (1980) 6

United States v. Bass,
404 U.S. 336 (1971) 11, 20

United States v. Feola,
420 U.S. 671 (1975) 14

United States v. Resendiz-Ponce,
549 U.S. 102 (2007) 6

United States v. U.S. Gypsum Co.,
438 U.S. 422 (1978) 6, 16

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Williams,
128 S. Ct. 1830 (2008) 13

United States v. Wiltberger,
18 U.S. (5 Wheat.) 76 (1820) 11

United States v. X-Citement Video,
513 U.S. 64 (1994) 6, 12, 13

United States v. Yermian,
468 U.S. 63 (1984) 5, 13, 14

Statutes

18 U.S.C. § 1001 5

18 U.S.C. § 1028A(a)(1) 3

18 U.S.C. § 2241 5

18 U.S.C. § 3551(a) 19

18 U.S.C. § 3553(a) 19

18 Pa. Con. Stat. § 302(d) 9

720 Ill. Comp. Stat. 5/4-3(b) 9

Ala. Code § 13A-2-4(a) 9

Ariz. Rev. Stat. Ann. § 13-202(A) 9

Ark. Code Ann. § 5-2-203(a) 9

Colo. Rev. Stat. § 18-1-503(4) 9

Conn. Gen. Stat. § 53a-5 9

Del. Code Ann. tit. 11, § 252 9

TABLE OF AUTHORITIES
(continued)

Page(s)

Haw. Rev. Stat. § 702-207 9

Ind. Code § 35-41-2-2(d) 9

Me. Rev. Stat. Ann. tit. 17-A, § 34(2) 9

Mo. Rev. Stat. § 562.021(1) 9

Mont. Code Ann. § 45-2-103(4) 9

N.D. Cent. Code § 12.1-02-02(3)(a), (b) 9

N.H. Rev. Stat. Ann. § 626:2(I) 9

N.J. Stat. Ann. § 2C:2-2(c)(1) 9

N.Y. Penal Law § 15.15(1) 9

Or. Rev. Stat. § 161.115(1) 9

Other Authorities

ALI, Model Penal Code § 2.02(4) (1985) 4, 5

Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 Colum. L. Rev. 1425 (1968) 10

INTERESTS OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit organization with a direct national membership of more than 12,500 attorneys, in addition to more than 35,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association ("ABA") recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice.

This case presents the question whether a statute's specified *mens rea* requirement extends to all elements of the offense. *Amicus* has a substantial interest in the resolution of that question, which will affect a significant number of defendants in the federal courts.

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than amicus, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question whether a statutorily specified *mens rea* requirement extends to all elements of the offense or only to a subset of the elements. This Court should adopt the approach of the Model Penal Code to resolve that issue. Under the Model Penal Code, a specified *mens rea* requirement extends to all material elements of an offense unless a contrary purpose plainly appears.

The Court's adoption of that approach would provide much needed guidance to Congress; it would give courts a standard they can easily administer; it would promote uniformity in the interpretation of federal statutes; it would help to ensure that Congress, rather than the courts, defines the outer boundaries of the criminal law; and it would help to ensure fair notice of what the law requires. And while this Court's cases have not expressly adopted the Model Penal Code rule, they provide a firm foundation for its adoption.

Under the Model Penal Code rule, this case is easy to resolve. As petitioner's brief demonstrates there is affirmative evidence that Congress intended to extend the knowledge requirement in the identity theft statute to all elements of the offense. At the very least, however, no contrary purpose plainly appears.

The rule of lenity also requires interpreting the knowledge requirement in the identify theft statute to extend to all elements of the offense. This Court has repeatedly applied the rule of lenity to incorporate *mens rea* requirements into federal

statutes and to extend specified *mens rea* requirements to all elements of the offense. The rule of lenity has added force in this case because the identity theft statute imposes a mandatory minimum sentence, depriving courts of their usual discretion to tailor a defendant's sentence to the defendant's particular circumstances.

At the very least, this statute is ambiguous on the question whether the knowledge requirement extends to all elements of the offense. The rule of lenity requires that ambiguity to be resolved in the defendant's favor.

ARGUMENT

I. THIS COURT SHOULD ADOPT THE MODEL PENAL CODE RULE THAT A SPECIFIED *MENS REA* REQUIREMENT EXTENDS TO ALL MATERIAL ELEMENTS OF A STATUTE UNLESS A CONTRARY PURPOSE PLAINLY APPEARS.

1. The statute at issue in this case imposes a mandatory two-year sentence on any person who, during and in relation to certain predicate offenses, "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." 18 U.S.C. § 1028A(a)(1). The question presented is whether "knowingly" modifies the phrase "of another person." If so, the government must prove that a defendant knew that the means of identification he used belonged to "another person." If not, a defendant is subject to conviction if the means of identification in fact belonged to another person, but the defendant did not know that it did.

This Court has on several occasions addressed the question of "how far down the sentence the word 'knowingly' is intended to travel," without expressly adopting a uniform rule for resolving that question. *See, e.g., Liparota v. United States*, 471 U.S. 419, 424-25 (1985). The Model Penal Code, however, has adopted such a rule. The Model Penal Code rule specifies that:

> When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all material elements of the offense, unless a contrary purpose plainly appears.

ALI, Model Penal Code § 2.02(4) (1985). That rule responds to "the pervasive ambiguity" in statutes that specify a *mens rea* requirement, "namely" the "difficulty" in determining "how many of the elements of the offense the requirement is meant to modify." *Id.* § 2.02(4), Explanatory Note.

Under the Model Penal Code rule, a specified *mens rea* requirement extends to all elements of an offense, subject only to three built-in limitations. First, the rule does not apply when Congress "expressly distinguish[es]" among the elements. For example, if Congress places a "knowingly" requirement next to one element, and a "recklessly' requirement next to another, the rule would not apply. *See id.* (rule does not apply when "legislature prescribes "different kinds of culpability for different elements").

Second, the rule does not apply to elements that are not "material." A "material" element encompasses any element that relates to "the harm or evil sought to be prevented by the law defining an offense," but does not encompass other matters, such as "jurisdiction," or "venue." *Id.* § 2.02, Explanatory Note. Thus, when Congress specifies as an element of an offense that the defendant's conduct must occur in the "territorial jurisdiction of the United States," a specified *mens rea* requirement would not automatically extend to that jurisdictional element. *See, e.g.*, 18 U.S.C. § 2241.

Third, the rule does not apply when "a contrary purpose plainly appears." Model Penal Code § 2.02(4). For instance, when Congress sets forth one element first, then sets forth the *mens rea* requirement, and then sets forth the rest of the elements, a purpose not to apply the *mens rea* requirement to the first element "plainly appears." The false statement statute is a good example. It subjects to criminal punishment "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully makes any false, fictitious or fraudulent statements or representations." 18 U.S.C. § 1001. By placing the "knowingly and willfully" requirement after the first element, Congress plainly expressed its purpose not to apply the requirement to that element. *United States v. Yermian*, 468 U.S. 63, 68 (1984).

Under the Model Penal Code's rule, the presumption that a specified *mens rea* requirement extends to all elements is not rebutted by a showing that applying the *mens rea* requirement to a particular element is not the "most natural

grammatical reading." *United States v. X-Citement Video,* 513 U.S. 64, 68 (1994). When two readings are both possible, and the one that does not extend the *mens rea* requirement to all elements is simply the "most grammatical," a purpose to negate the *mens rea* requirement does not "plainly appear." Moreover, in general, the presumption that *mens rea* extends to all elements could not ordinarily be overcome by legislative history, comparisons to common law analogues, comparisons to related statutes, or the difficulty of prosecution. All of these sources may provide some basis for an *inference* that Congress may not have intended to extend a specified *mens rea* requirement to a particular element. But only rarely would they lead to the conclusion that a contrary purpose *"plainly appears."*

2. This Court has sometimes looked to the Model Penal Guide for guidance in interpreting federal criminal statutes. *See, e.g., United States v. Resendiz-Ponce*, 549 U.S. 102, 107 (2007) (interpreting 8 U.S.C. § 1326(a)); *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 408-10 (2003) (interpreting 18 U.S.C. § 1964); *United States v. Bailey*, 444 U.S. 394, 404-05, 408 (1980) (interpreting 18 U.S.C. § 751(a)). Most significantly, the Court has frequently cited the Code's culpability provisions purpose, knowledge, recklessness, and negligence in interpreting *mens rea* requirements. *See, e.g., Safeco Ins. Co. of Am. v. Burr*, 127 S. Ct. 2201, 2215 n.18 (2007); *Holloway v. United States*, 526 U.S. 1, 11 n.11 (1999); *Ratzlaf v. United States*, 510 U.S. 135, 151 (1994); *Liparota*, 471 U.S. at 423 n.5; *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437-78 (1978).

This Court should once again follow the Model Penal Code's guidance. Specifically, this Court should adopt for all federal criminal statutes the Model Penal Code rule that a specified *mens rea* requirement extends to all material elements of an offense, unless a contrary purpose plainly appears.

A number of important considerations support the adoption of that rule. First, "Congress is entitled to know what meaning this Court will assign to terms regularly used in its enactments." *Riegel v. Medtronic, Inc.*, 552 U.S. , 128 S. Ct. 999, 1008 (2008). Congress regularly specifies in its criminal statutes a single *mens rea* requirement, such as "knowingly." The Court should therefore give Congress as much guidance as it can on how this Court will determine the scope of the *mens rea* requirement. An approach that relies on a wide ranging indeterminate inquiry into rules of grammar, common law analogues, legislative history, related statutes, and other factors provides very little in the way of concrete guidance. By contrast, the rule that a specified *mens rea* requirement will extend to all material elements of the offense unless a contrary intent plainly appears affords Congress "a predictable background rule against which to legislate." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994).

Second, the Model Penal Code rule supplies courts with an easily administrable standard to determine the scope of a *mens rea* requirement. In fact, the application of that rule should eliminate legitimate debate about the issue in many cases. The experience of the states applying that rule provides hard evidence supporting that conclusion.

In most cases, application of the rule is routine and leads to the conclusion that the *mens rea* requirement applies to all elements. *See, e.g.*, *State v. Hopkins*, 873 S.W.2d 911, 912 (Mo. Ct. App. 1994) (holding that "knowingly" applies to the age of the child element for a statute criminalizing whoever "knowingly encourages, aids or causes a child less than seventeen years old" to engage in conduct tending to injure his welfare); *State v. Gaylord*, 890 P.2d 1167, 1177 (Haw. 1995) (applying the specified "intent" requirement to "each of the elements set forth" in a theft statute, because "no contrary purpose 'plainly appears' on the face of the statute"); *Gibson v. State*, 643 N.E.2d 885, 887 & n.7 (Ind. 1994) (holding that *mens rea* requirement applies to all elements in statute that criminalized whoever "knowingly or intentionally receives, retains, or disposes of the property of another person that has been the subject of theft"); *Commonwealth v. Scolieri*, 813 A.2d 672, 678 (Pa. 2002) (holding that specified *mens rea* requirement applied "to all elements"); *State v. Worthy*, 746 A.2d 1063, 1067 (N.J. Super. Ct. App. Div. 2000) (concluding that "any ambiguity as to whether 'knowingly' was intended to apply to each element of the offense is clarified by" rule extending *mens rea* to all elements of the offense) (citation omitted).

That does not mean that the state courts always conclude that the specified *mens rea* requirement extends to all elements. In some cases, the legislature plainly expresses a contrary intent. And when it does, the state courts readily conclude that the *mens rea* requirement does not apply to that particular element. *See, e.g.*, *People v. Benzor*, 100

P.3d 542, 544 (Colo. App. 2004) (observing that "the mental state 'knowingly' appears after the 'following a conviction of a felony' element and before the 'escapes from said custody or confinement' element" in a statute, and concluding that "[s]uch placement is indicative of the General Assembly's intent that the mental state 'knowingly' apply only to the conduct element of the crime of escape following conviction"); *State v. Cabans-Salgado*, 92 P.3d 421, 423 (Ariz. Ct. App. 2004) (declining to apply the presumption and extend a *mens rea* term to an element because "a contrary legislative purpose plainly appears" in the text of a felony murder statute explicitly stating that it "requires no specific mental state other than what is required for the commission of any of the enumerated felonies"); *Louallen v. State*, 778 N.E.2d 794, 798 (Ind. 2002) (construing a statute penalizing whoever fondles or touches a child "with intent to arouse" and declining to extend this "intent" requirement back to the fondling or touching elements specified earlier in the text).[2]

[2] At least eighteen American states have codified this interpretive canon by statute, and courts have applied it in others as well. *See* Ala. Code § 13A-2-4(a); Ariz. Rev. Stat. Ann. § 13-202(A); Ark. Code Ann. § 5-2-203(a); Colo. Rev. Stat. § 18-1-503(4); Conn. Gen. Stat. § 53a-5; Del. Code Ann. tit. 11, § 252; Haw. Rev. Stat. § 702-207; 720 Ill. Comp. Stat. 5/4-3(b); Ind. Code § 35-41-2-2(d); Me. Rev. Stat. Ann. tit. 17-A, § 34(2); Mo. Rev. Stat. § 562.021(1); Mont. Code Ann. § 45-2-103(4); N.H. Rev. Stat. Ann. § 626:2(I); N.J. Stat. Ann. § 2C:2-2(c)(1); N.Y. Penal Law § 15.15(1); N.D. Cent. Code § 12.1-02-02(3)(a), (b); Or. Rev. Stat. § 161.115(1); 18 Pa. Con. Stat. § 302(d); *see also People v. Tombs*, 697 N.W.2d 494, 499 (Mich. 2005); *State v. Lundgren*, 1994 WL 171657, at *7-8 (Ohio Ct. App. Apr. 22, 1994).

While the Model Penal Code rule can be easily administered by the courts, an unguided totality-of-the-circumstances approach places needless strain on the judicial system. The litigation over the meaning of this particular statute exposes the weaknesses of that approach. Courts all over the country have struggled with this issue. They have diagrammed sentences, applied grammatical rules, poured over the legislative history, compared the statute to related statutes, compared the statute to common law analogues, attempted to divine the purpose of the statute, and considered the practical problems of enforcement. Yet because of the indeterminacy of the inquiry, they have reached diametrically opposed conclusions about the meaning of a simple sentence. This Court's review will, of course, resolve the issue. But meanwhile countless participants in the judicial system have expended scarce resources on a question that ideally should be capable of easy resolution.

Third, the Model Penal Code promotes the goal of uniformity in the interpretation of federal statutes. *See* Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 Colum. L. Rev. 1425, 1437 (1968) (stating that the purpose of the provision "to promote uniformity upon the issue"). Under the unguided approach, there is a risk that courts will interpret the scope of *mens rea* requirements in similarly drafted statutes differently even when there is very little reason to believe that Congress intended such a variance. Under the Model Penal Code rule, interpretations of the scope of the *mens rea* requirement will not vary

from statute to statute, unless Congress plainly so intended.

Fourth, the Model Penal Code rule is faithful to the principle that only Congress has the power to define criminal activity. This Court long ago held that "it is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). Since then, the Court has consistently reaffirmed that principle, explaining that "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971).

Under the unguided approach to determining the scope of a *mens rea* requirement, there is a substantial risk that a court will determine that a *mens rea* requirement does not apply to an element of the offense even when Congress intended otherwise. In that event, the court would effectively be defining activity as criminal that Congress has chosen not to criminalize. A rule that extends the *mens rea* requirement to all elements unless a contrary purpose plainly appears eliminates that risk and ensures that an activity will not be criminalized unless Congress so intended.

Finally, the Model Penal Code rule helps to ensure that persons receive fair notice of what the law makes illegal. Fair notice is a basic element of due process. *Lambert v. California*, 355 U.S. 225, 228 (1957). The Court has therefore long required that criminal statutes give "fair warning . . . of what

the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). Under the unguided totality-of-the-circumstances approach to determining the scope of a *mens rea* requirement, however, it may be difficult, if not impossible, to know in advance of a decision by this Court what a criminal statute actually makes illegal. By contrast, the rule that *mens rea* extends to all elements unless a contrary purpose plainly appears will ensure fair warning on the scope of any specified *mens rea* requirement.

3. This Court's cases have not expressly adopted the Model Penal Code approach. They have, however, provided a firm grounding for its adoption. In *X-Citement Video*, a case involving the scope of a specified *mens rea* requirement, the Court viewed the Court's cases have having established a tradition of interpreting "criminal statutes to include broadly applicable scienter requirements." 513 U.S. at 70.

In *Bryan v. United States*, 524 U.S. 184, 193 (1998), the Court stated that "unless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense." Similarly, in *Staples v. United States*, 511 U.S. 600, 605 (1994), the Court observed that "a conventional *mens rea* element . . . require[s] that the defendant know the facts that make his conduct illegal." While neither of these cases involved the question of the scope of a specified *mens rea* requirement, their formulations are both supportive of a general rule that a specified requirement extends to all elements.

Moreover, the Court's key cases that have interpreted the scope of a *mens rea* requirement are consistent in result with the Model Penal Code rule. A number of cases have involved statutes in which a knowledge requirement preceded all elements of the offense. In *Liparota*, 471 U.S. at 420, the statute subjected to criminal punishment anyone who "knowingly" used food stamps in an unauthorized manner. In *X-Citement Video*, the statute subjected to criminal punishment anyone who knowingly transported or received depictions of minors engaged in sexually explicit conduct. 513 U.S. at 68. And in *United States v. Williams*, 128 S. Ct. 1830, 1836 (2008), the statute subjected to punishment anyone who knowingly distributed material reflecting the belief or intending to cause another to believe that the material depicted a minor engaging in sexually explicit conduct. In all three case, the Court held that the knowledge requirement extended to all elements of the offense. *Liparota*, 471 U.S. at 433; *X-Citement Video*, 513 U.S. at 78; *Williams*, 128 S. Ct. at 1839.[3]

The two key cases in which a specified *mens rea* requirement has not been extended to all elements have both involved exceptions to the Model Penal Code's presumptive rule. One of the statutes has already been discussed: the statute that subjects to criminal punishment anyone who, within the jurisdiction of a federal agency, knowingly makes a false statement. The Court's holding in *Yermian*, 468 U.S. 63, that the defendant does not have to

[3] The description of the statutes in *Liporota*, *X-Citement Video*, and *William* are paraphrases, but capture their essence.

know that the false statement is within the jurisdiction of the United States fits within two of the Model Penal Code exceptions. First, it fits within the exception for jurisdictional facts. *Id.* at 68. And second, because Congress placed the knowledge requirement after that jurisdictional element, a purpose not to extend the knowledge requirement to that element plainly appeared. *Id.* at 69.

The other key case refusing to extend a specified *mens rea* requirement to an element of the offense also falls within the Model Penal Code exception. In *United States v. Feola*, 420 U.S. 671 (1975), the Court held that the knowledge requirement in a statute that criminalized knowingly assaulting a federal officer while the officer was engaged in official duties did not require the government to prove that the defendant knew that his victim was a federal officer. The Court explained that the officer's status as a federal officer was a jurisdictional fact and that *mens rea* requirements do not ordinarily extend to jurisdictional facts. *Id.* at 676-77 & n.9. Because the Court viewed the victim's status as a federal officer as jurisdictional, that case also falls within the Model Penal Code's exception for jurisdictional facts.

Thus, while the Court has not expressly adopted the Model Penal Code's presumption that a prescribed *mens rea* requirement applies to all elements of the offense, its decisions provide a firm grounding for that rule. Because there are powerful reasons to adopt the rule, and because the Court's

cases provide a firm grounding for the rule, the Court should embrace that rule.[4]

4. In this case, the application of the Model Penal Code rule leads to an easy answer to the question presented. Petitioner's brief demonstrates that Congress affirmatively intended to require the government to prove that defendant knew that the means of identification he used identification belonged to another person. Under the Model Penal Code rule, the result is the same, but the analysis is simpler. There is a presumption that the *mens rea* requirement applies to that element, and, for the reasons discussed in petitioner's brief, no contrary purpose "plainly appears."

II. THE RULE OF LENITY REQUIRES READING THE STATUTE TO REQUIRE KNOWLEDGE OF ALL ELEMENTS OF THE CRIME.

The rule of lenity also leads to the conclusion that the identity theft statute requires proof that the defendant knew that he used the means of identification of another person. The identity theft statute is, at the very least, ambiguous on whether it

[4] Amicus has not done a complete search for all of this Court's *mens rea* cases. To the extent that there are any cases that refuse to extend a *mens rea* requirement to all the elements of a particular statute, and that refusal does not fall within one of the Code's exceptions, the Court may preserve the interpretation of that statute as a matter of stare decisis. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 773 (2008) (preserving § 10(b) private cause of action, but refusing to extend it).

requires proof that the defendant had knowledge that he was using the identification of another person. Under the rule of lenity, that ambiguity must be resolved in favor of the defendant. *Rewis v. United States*, 401 U.S. 808, 812 (1971) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity") (citation omitted).

This Court has recognized the strong link between the rule of lenity and the presumption in favor of *mens rea*. In *Gypsum*, the Court noted that its precedents had relied on the rule of lenity as a basis for "read[ing] a state of mind component into an offense even when the statutory definition did not in terms so provide." 438 U.S. at 437 (citing *Rewis*, 401 U.S. at 812).

The Court has also applied the rule of lenity to resolve ambiguity on the scope of a specified *mens rea* requirement. In *Liparota*, for example, the Court relied on the rule of lenity to extend the specified "knowingly" *mens rea* requirement to all material elements of the statute. It reasoned that "requiring *mens rea*" for the final "not authorized" element of the statute "is in keeping with our longstanding recognition of the principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" 471 U.S. at 427 (citations omitted). The Court added that the rule of lenity "provides a time-honored interpretive guideline when the congressional purpose is unclear" on whether "knowingly" applies to a particular element of the statute. *Id.*

The rule of lenity rests on two core principles that the public have fair notice before

being punished for an offense, and that courts should not penalize conduct that Congress did not intend to reach. *United States v. Aguilar*, 515 U.S. 593, 600 (1995). As this Court has recognized, those core principles are fully applicable in determining the scope of a specified *mens rea* requirement. In *Liparota*, the Court expressly relied on those principles in extending the specified *mens rea* to all the elements of the offense. 471 U.S. at 427. Similarly, in *Arthur Andersen LLP v. United States*, this Court cited these core lenity principles in broadly applying a "knowingly" requirement to various elements of the offense. 544 U.S. 696, 703 (2005).

Application of the rule of lenity in determining the reach of a *mens rea* term avoids the uncertainty and unfairness that may result from reliance on particular grammatical theories, purported broader statutory purposes, or legislative history. In *Ratzlaf*, after reading a statute's designated *mens rea* requirement to apply broadly to elements of the offense, the Court explained that its reading of the text precluded a resort to legislative history. It observed, though, that even if it had found the *mens rea* "requirement ambiguous as applied . . . we would resolve any doubt in favor of the defendant" through the rule of lenity rather than turn to legislative history. 510 U.S. at 148; *see also Crandon v. United States*, 494 U.S. 152, 160 (1990) ("Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text."). This Court's cases thus

firmly support application of the rule of lenity to resolve any ambiguity in the scope of a specified *mens rea* requirement.

The rule of lenity has added force in this case because a violation of the identity theft statute results in the imposition of a mandatory minimum sentence over and above the sentence for the predicate offense. The construction of a mandatory minimum sentencing offense squarely implicates the history and policies underlying the rule of lenity.

This Court has repeatedly held that the rule of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco v. United States*, 447 U.S. 381, 387 (1980); *see also Ladner v. United States*, 358 U.S. 169, 178 (1958) (stating that the rule applies to any question of statutory interpretation that would "increase the penalty that [the statute] places on an individual"). These holdings follow from the rule's core principles. Because the rule of lenity does not rest on an "assum[ption] that offenders against the law carefully read the penal code," *Bell v. United States*, 349 U.S. 81, 83-84 (1955), but instead on broader imperatives that the criminal laws be clear and punishments decided by Congress, the rule has the same force in determining the meaning of a statute that increases penalties as it does in determining the meaning of a statute that makes conduct criminal.

The rule of lenity plays a special role in interpreting statutes that impose a mandatory minimum sentence because mandatory minimum sentences constitute an exception to Congress's

general sentencing requirements. In the Sentencing Reform Act of 1984, Congress has required a court to impose a sentence that is "not greater than necessary," 18 U.S.C. § 3553(a) unless "otherwise specifically provided." *Id.* § 3551(a). Congress has also required that judges take into account all circumstances in imposing a sentence in order to match a defendant's sentence to the circumstances of the case. *Id.* § 3553(a). These requirements accord with the longstanding federal sentencing tradition of considering "every convicted person as an individual and every case as . . . unique." *Gall v. United States*, 552 U.S. , 128 S. Ct. 586, 598 (2007) (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996)). Mandatory minimums constitute an exception to these more general statutory requirements. Thus, the broader the reading of a mandatory minimum statute the greater the danger that it will undermine Congress's general policy in favor of individualized sentencing. Application of the rule of lenity can play a critical role in preventing that from occurring. By requiring that ambiguities in statutes that impose mandatory minimum sentences be resolved in the defendant's favor, the rule of lenity helps to ensure that the mandatory minimum exceptions do not swallow the general rule of individualized sentencing.

Applying the rule of lenity to mandatory sentences can also foster uniformity, certainty, and precision in the criminal law. The uncertainty in the interpretation of mandatory statutes can impede the plea negotiations that today help resolve a large majority of the federal criminal caseload. These negotiations will proceed more quickly and smoothly

if the law that governs criminal punishment is clear. *See Holloway v. United States*, 526 U.S. 1, 22 (1999) (Scalia, J., dissenting) (citing the "*in terrorem* effect" of expanded liability on "a modern federal criminal-law system characterized by plea bargaining" as support for the rule of lenity).

Finally, the rule of lenity embodies an "instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." *Bass*, 404 U.S. at 348 (quoting Henry J. Friendly, "Mr. Justice Frankfurter and the Reading of Statutes," in Benchmarks 196, 209 (1967)). Mandatory sentences directly implicate that concern because they remove the discretion of judges to take into account the factors that call for a reduced sentence. *See Harmelin v. Michigan*, 501 U.S. 957, 1007 (1991) (Kennedy, J., concurring in part and concurring in the judgment) ("Mandatory sentencing schemes can be criticized for depriving judges of the power to exercise individual discretion when remorse and acknowledgment of guilt, or other extenuating facts, present what might seem a compelling case for departure from the maximum."). Accordingly, when there is any ambiguity in the reach of a statute that imposes a mandatory minimum sentence, that ambiguity should be resolved in favor of the defendant.

In this case, petitioner has shown that, at the very least, this statute is ambiguous on the question whether the government must prove that the defendant knew that the identification he used belonged to another person. The rule of lenity requires that ambiguity to be resolved in the defendant's favor.

CONCLUSION

For the foregoing reasons, the judgment should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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114

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IGNACIO FLORES-FIGUEROA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
INTEREST OF *AMICI CURIAE* 1
SUMMARY OF ARGUMENT 1
ARGUMENT 3
I. The Aggravated Identity Theft Statute's Imposition of an Increased Punishment, in Addition to the Punishment for the Underlying Identity Fraud Crimes, Shows That Aggravated Identity Theft Concerns More Culpable Individuals Who Knowingly Intend to Use Another's Identity 3
A. The Criminal Law Typically Calibrates Punishment to Culpability 3
B. Interpreting the Aggravated Identity Theft Statute to Impose Additional Punishment for More Culpable Conduct Is Consistent With the Statute's Structure and Legislative History. 10
II. The Government's Reading of the Aggravated Identity Theft Provision Contravenes the Principle That the Degree of Punishment Generally Should Reflect the Level of Culpability and Leads to Disparate Sentencing Results. 22
CONCLUSION 29
APPENDIX – NAMES OF *AMICI CURIAE*

TABLE OF AUTHORITIES

CASES

Busic v. United States, 446 U.S. 398 (1980) 9

Commonwealth v. Vizcarrondo, 693 N.E.2d 677 (Mass. 1998) 5

Ladner v. United States, 358 U.S. 169 (1958) 9, 10

Morissette v. United States, 342 U.S. 246 (1952) 4, 6, 8, 18

People v. Ryan, 626 N.E.2d 51 (N.Y. 1993), *superseded by statute*, 1995 N.Y. Laws 75 ..... 5, 6

State v. Beayon, 605 A.2d 527 (Vt. 1992) 5

State v. Blanton, 588 P.2d 28 (Or. 1978) 6

State v. Green, 647 S.E.2d 736 (W. Va. 2007) 5

United States v. Blixt, 548 F.3d 882 (9th Cir. 2008) 23

United States v. Hairup, 565 F. Supp. 2d 1309 (D. Utah 2008) 18, 28

United States v. LaBonte, 520 U.S. 751 (1997) 7

United States v. Mendoza-Gonzalez, 520 F.3d 912 (8th Cir. 2008), *petition for cert. filed*, U.S.L.W. (U.S. July 15, 2008) (No. 08-5316) 26

United States v. Phillips, 477 F.3d 215 (5th Cir. 2007) 7

United States v. Sanchez, No. 08-CR-0017 (CPS), 2008 U.S. Dist. LEXIS 35460 (E.D.N.Y. Apr. 30, 2008) 27

United States v. Villanueva-Sotelo, 515 F.3d 1234 (D.C. Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3308 (U.S. Nov. 7, 2008) (No. 08-622) 17-18, 19, 21, 22, 27

United States v. White, No. 06-4141, 2008 U.S. App. LEXIS 21654 (6th Cir. Oct. 10, 2008) 23

United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) 8

Williams v. New York, 337 U.S. 241 (1949) 7

STATUTES

8 U.S.C. § 1306(d) 14

8 U.S.C. § 1324c(a)(2) 15

18 U.S.C. § 254 10

18 U.S.C. § 911 14

18 U.S.C. § 922(a)(6) 15

18 U.S.C. § 924(c) 9

18 U.S.C. § 1002 15

18 U.S.C. § 1015(c) 14

18 U.S.C. § 1028 20

18 U.S.C. § 1028A(a)(1) ..... *passim*

18 U.S.C. § 1028A(b) 16
18 U.S.C. § 1028A(b)(2) 16
18 U.S.C. § 1028A(b)(3) 16
18 U.S.C. § 1028A(c)(2) 14
18 U.S.C. § 1028A(c)(3) 15
18 U.S.C. § 1028A(c)(4) 14, 15
18 U.S.C. § 1028A(c)(6) 14
18 U.S.C. § 1028A(c)(7) 11, 14, 15
18 U.S.C. § 1028A(c)(9) 14
18 U.S.C. § 1028A(c)(10) 15
18 U.S.C. § 1028A(c)(11) 12
18 U.S.C. § 1029(a)(2) 22
18 U.S.C. § 1030 7
18 U.S.C. § 1030(a)(5)(A) 7
18 U.S.C. § 1030(a)(5)(B) 7
18 U.S.C. § 1030(a)(5)(C) 7
18 U.S.C. § 1030(c)(4)(A) 7
18 U.S.C. § 1030(c)(4)(B) 7
18 U.S.C. § 1030(c)(4)(G) 7
18 U.S.C. § 1423 14
18 U.S.C. § 1424 14
18 U.S.C. § 1426 14
18 U.S.C. § 1543 14
18 U.S.C. § 1544 15

18 U.S.C. § 1546(a) 11

18 U.S.C. § 1546(b) 11, 12

21 U.S.C. § 841 7

21 U.S.C. § 844(a) 7

42 U.S.C. § 408(a) 12, 13

Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1005(a), 98 Stat. 1837 (amending 18 U.S.C. § 924(c)) 9

Identity Theft Penalty Enhancement Act, Pub. L. No. 108-275, 118 Stat. 831 (2004) 19

LEGISLATIVE MATERIAL

150 Cong. Rec. H4809 (daily ed. June 23, 2004) 21

H.R. Rep. No. 108-528 (2004), *as reprinted in* 2004 U.S.C.C.A.N. 779 ..... 20, 21

OTHER AUTHORITIES

ALI Model Penal Code: Sentencing § 1.02(2) (Tent. Draft No. 1, Apr. 9, 2007) 8

50 Am. Jur. 2d *Larceny* § 37 (2008) 19

WILLIAM BLACKSTONE, 4 COMMENTARIES 3

Frank O. Bowman, III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 5 (2001) 19

JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW (4th ed. 2006) 18

Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185 (1993) 16

http://www.usdoj.gov/criminal/fraud/websites/idtheft.html 22

1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW (2d ed. 2003) 3

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Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25 (2005) 16

Peter R. Moyers, *Butchering Statutes: The Postville Raid and the Misinterpretation of Federal Law*, 32 SEATTLE L. REV. (forthcoming 2009), available at http://papers.ssrn.com 26-27

Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815 (1980) 3

Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199 (1993) 16

Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425 (1968) 4

James Boyd White, *Legal Knowledge*, 115 HARV. L. REV. 1396 (2002) 4

INTEREST OF *AMICI CURIAE*[1]

Amici curiae, listed by name in the Appendix, are professors of criminal law at law schools in the United States, who teach, research, write and speak about criminal law and criminal justice. As such, *amici curiae* have an interest in ensuring that the criminal law is interpreted consistently with fundamental principles of criminal justice. Specifically, *amici curiae* submit this brief to highlight the guiding principle that criminal punishment should be, and typically is, calibrated to the culpability of the offender. Accordingly, 18 U.S.C. § 1028A(a)(1), with its enhanced mandatory minimum sentence, is best interpreted as applicable only to those individuals who intentionally steal another's identity, and not to those who use a false means of identification without knowing that it belongs to another person. Adopting the Eighth Circuit's contrary interpretation, however, undermines this basic principle by punishing individuals irrespective of culpability.

SUMMARY OF ARGUMENT

A fundamental principle of criminal justice is that criminal punishment is typically calibrated to culpability. That is to say, punishment generally increases to reflect increasingly wrongful states of

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief. Both petitioner and respondent have consented to the filing of this brief, and, pursuant to Rule 37.3(a), letters of consent have been filed with the Clerk of the Court.

mind. This principle strongly supports an interpretation of 18 U.S.C. § 1028A(a)(1) requiring an individual to know that a means of identification used belongs to another person.

Congress's intent to respect this principle is also reflected in the structure of the statutory scheme in which section 1028A resides. Against a backdrop of numerous statutory provisions proscribing various identity-fraud-related conduct, section 1028A provides for an additional two-year mandatory punishment for the more culpable conduct of identity theft. As such, in order to trigger the inflexible mandatory minimum, an individual must intend to steal another's identity.

Moreover, the legislative history, together with background common law conceptions of "theft," demonstrates that Congress sought to do precisely what the statutory structure suggests: single out more culpable offenders for increased punishment.

The government's interpretation, which was accepted by the Eighth Circuit, would disregard this foundational principle of criminal justice and punish irrespective of culpability. Individuals with the sole intent to use a fraudulent document would be punished differently based on mere chance – namely, whether the means of identification turns out to belong to another person. Moreover, individuals with different degrees of wrongful intent – those who intend to steal another's identity as compared with those who intend only to use a fictitious means of identification – would be punished equally should the latter inadvertently use another person's means

of identification. There is no indication that Congress sought such arbitrary results. Accordingly, the Eighth Circuit's decision in this matter should be reversed.

ARGUMENT

I. The Aggravated Identity Theft Statute's Imposition of an Increased Punishment, in Addition to the Punishment for the Underlying Identity Fraud Crimes, Shows That Aggravated Identity Theft Concerns More Culpable Individuals Who Knowingly Intend to Use Another's Identity.

A. The Criminal Law Typically Calibrates Punishment to Culpability

A fundamental principle of our criminal justice system is that punishment should be calibrated to criminal culpability. *See* WILLIAM BLACKSTONE, 4 COMMENTARIES *17 ("It is moreover absurd and impolitic to apply the same punishment to crimes of different malignity."); *id.* at *18 (arguing that "a scale of crimes should be formed, with a corresponding scale of punishments"); 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.5, at 42-43 n.43 (2d ed. 2003) ("'[T]he severity of the sanctions visited on the offender should be proportioned to the degree of his culpability." (quoting FRANCIS ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 66 (1981))); Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 850 (1980) (tracing the historical evolution of criminal culpability distinctions and concluding that "[t]he most significant general observation is

that the process of recognizing additional distinctions [as to culpability] has been through the recognition of additional bases for mitigation. The new distinction creates a new category that will receive less harsh punishment, or limits a more harsh punishment to the old category"); Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1437-38 (1968) ("[I]n determining the gravity of crimes for purposes of sentence, it is often useful to lay stress on purpose. This is frequently the case under the older law as well as in the [Model Penal] Code."); James Boyd White, *Legal Knowledge*, 115 HARV. L. REV. 1396, 1403 (2002) ("At [the Model Penal Code's] center is the idea of blameworthiness or culpability, which is used both to determine criminality itself and to assess its degree . . . . The legislative assignment of degrees of culpability to . . . different elements [of a crime] is to be the product of a reasoned judgment based upon the fundamental principle that the criminal law should provide a graduated set of punishments to reflect graduated levels of blameworthiness.").

Not surprisingly, this Court, along with numerous state courts, has recognized the long history and great importance of the correlation of punishment to culpability. *See, e.g.*, *Morissette v. United States*, 342 U.S. 246, 264 (1952) ("Congress has been alert to what often is a decisive function of some mental element in crime. It has seen fit to prescribe that an evil state of mind . . . will make criminal an otherwise indifferent act, or increase the degree of the offense or its punishment.") (footnote

omitted); *State v. Green*, 647 S.E.2d 736, 746 (W. Va. 2007) (noting "'the important principle that a person's criminal liability for an act should be proportioned to his or her moral culpability for that act'" (quoting *State v. Pray*, 378 A.2d 1322, 1324 (Me. 1977))); *Commonwealth v. Vizcarrondo*, 693 N.E.2d 677, 681 (Mass. 1998) ("A conviction of murder founded on a state of mind sufficient only to support a manslaughter conviction . . . . is . . . inconsistent with the principle that criminal liability and punishment for an act should be proportionate to the actor's moral culpability for that act."); *State v. Beayon*, 605 A.2d 527, 529 (Vt. 1992) ("[A] person's criminal liability for an act should be proportioned to his or her moral culpability for that act.").

In *People v. Ryan*, 626 N.E.2d 51 (1993), *superseded by statute*, 1995 N.Y. Laws 75, N.Y. Penal Law § 15.20(4), the New York Court of Appeals faced a question analogous to the one presented here. The question in *Ryan* was whether the knowledge requirement of the State's controlled substances statute applied to each element of the offense, including drug weight. The statute recognized six degrees of criminal possession, with corresponding maximum sentences of imprisonment ranging from one-year to life. In many instances, drug weight alone determined the offense degree and accompanying severity of punishment. The Court's decision was supported by the principle that culpability and punishment should be calibrated to each other. The Court held that the legislature did not intend to treat an individual as "deserving of enhanced punishment unless he or she is aware that

the amount possessed is greater." *Id.* at 56. In so holding, the Court of Appeals declined in the absence of indications to the contrary to "ascribe to the Legislature an intent to mete out drastic differences in punishment without a basis in culpability" as that "would be inconsistent with notions of individual responsibility and proportionality prevailing in Penal Law." *Id.* at 55; *see also State v. Blanton*, 588 P.2d 28, 29 (Or. 1978) (extending knowledge requirement in drug distribution statute to the age of the recipient in order to trigger the increased punishment for furnishing narcotics to persons under 18 years of age).

In accordance with these same principles, federal criminal law generally seeks to calibrate punishment to culpability. Graded offenses, for example, are typically distinguished based on the degree of culpability, with increased culpability warranting more severe punishment. The distinction between manslaughter and murder is a classic example. *See Morissette*, 342 U.S. at 264 n.24 ("Manslaughter, '. . . the unlawful killing of a human being without malice', if voluntary, carries a maximum penalty of imprisonment not to exceed ten years. If the killing is 'with malice aforethought', the crime is murder, and, if of the first degree, punishable by death or life imprisonment, or, if of the second degree, punishable by imprisonment for any term of years or life." (alteration in original) (citation omitted) (quoting 18 U.S.C. §§ 1112, 1111)).

The federal drug laws provide another example of increased sentences for offenders with heightened culpability. The maximum punishment for simple

possession of most controlled substances is one year. *See* 21 U.S.C. § 844(a). However, Congress provided that possession of the same controlled substances with intent to distribute will result in much more severe sentences. *See id.* § 841.

18 U.S.C. § 1030, which prohibits a number of computer crimes, provides additional examples of culpability calibration. A person who knowingly transmits a computer program and "intentionally causes damage" to a protected computer can receive a sentence of up to 10 years. 18 U.S.C. §§ 1030(a)(5)(A), (c)(4)(B). Intentional unauthorized access of a protected computer that "recklessly causes damage" is punishable by up to 5 years. *Id.* §§ 1030(a)(5)(B), (c)(4)(A). When the same conduct simply "causes damage and loss" – without any showing that such loss was purposefully or recklessly caused – the offense carries a maximum sentence of one year. *Id.* §§ 1030(a)(5)(C), (c)(4)(G); *see United States v. Phillips*, 477 F.3d 215, 223 n.9 (5th Cir. 2007) ("The differing degrees of culpability envisioned by Congress for the [three] subsections are reflected in the punishments Congress allotted to their violation.").[2]

[2] Also relevant is the determination of offender culpability in sentencing proceedings. This Court has recognized that sentencing regimes are often motivated by the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime." *Williams v. New York*, 337 U.S. 241, 247 (1949). Similarly, this Court has observed that the United States Sentencing Guidelines aim to respect "the principle that criminal conduct of greater severity should be punished more harshly than less serious conduct." *United States v. LaBonte*, 520 U.S. 751, 764 (1997); *see also* ALI Model

Because correlation of punishment to culpability is a notion so deeply ingrained in the criminal law, this Court has respected the principle in interpreting the scope of criminal statutes. Indeed, the premise gives rise to the deeply-rooted notion that wrongful intent is generally required to turn harmful conduct into criminal conduct – even where a statute does not plainly require as much. *See, e.g.*, *Morissette*, 342 U.S. at 250 ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion."); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) (noting the "presumption[] that some form of scienter is to be implied in a criminal statute even if not expressed"). Underscoring the importance of a culpability-punishment correlation, this Court has looked to the severity of a punishment in determining whether a statute requires criminal intent. *See* 513 U.S. at 71 ("[H]arsh penalties attaching to violations of the statute [are] a 'significant consideration in determining whether the statute should be construed as dispensing with *mens rea*.'" (quoting *Staples v. United States*, 511 U.S. 600, 616 (1994))).

Penal Code: Sentencing § 1.02(2) (Draft No. 1, Apr. 9, 2007) (providing that the first of the "general purposes of the provisions on sentencing" is "to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders"). These sentencing considerations are all the more relevant here because the mandatory minimum penalty imposed by section 1028A constrains the sentencing discretion of the trial judge.

In construing the mens rea requirement of ambiguous statutes, this Court's reliance on culpability considerations has not been limited to situations where otherwise innocent conduct might be criminalized. Rather, such reasoning has been applied with equal force in cases, such as this, where Congress has subjected already criminalized conduct to increased punishment. In *Busic v. United States*, 446 U.S. 398 (1980), *superseded by statute*, Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1005(a), 98 Stat. 1837, 2138-39, for example, this Court dealt with an ambiguity in the firearms enhancement contained in then 18 U.S.C. § 924(c) – specifically whether the sentencing enhancement could be applied to defendants convicted of a felony under a separate statute that itself authorizes an enhancement when a dangerous weapon is used. In holding that the additional enhancement at section 924(c) did not apply, the Court relied in substantial part on considerations of relative culpability.[3] *See Busic*, 446 U.S. at 411 (refusing to "impute to Congress the unlikely intention to . . . create a situation in which aiders and abettors would often be more culpable and more severely punished than those whom they aid and abet").

Ladner v. United States, 358 U.S. 169 (1958), is another example. There, the Court was reluctant to read a statute as requiring "incongruous results" that did not reflect a relationship between relative degrees of culpability and punishment. *Id.* at 177.

[3] The Court also relied in part on the rule of lenity. *See Busic*, 446 U.S. at 406.

The petitioner in *Ladner* had been convicted of two separate counts of assault on a federal officer after firing one shot that wounded two officers; he was sentenced to serve two consecutive ten-year terms. The Court had to decide whether, under then 18 U.S.C. § 254, one or two offenses had been committed. The Court, relying on principles of culpability and lenity in vacating Ladner's consecutive sentences, stressed that the number of officers affected would often have little connection to "the seriousness of the criminal act," and therefore that relying on that fact to determine the number of offenses committed would produce arbitrary results with respect to punishment. *Id.* at 178 ("This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.").

Thus, where there is a question as to Congress's intent, this Court has traditionally given effect to the longstanding principle that criminal punishment typically is calibrated to culpability.

B. Interpreting the Aggravated Identity Theft Statute to Impose Additional Punishment for More Culpable Conduct Is Consistent With the Statute's Structure and Legislative History.

As the title to section 1028A makes clear, the statute criminalizes "[a]ggravated identity theft." Specifically, section 1028A states: "Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or

uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years." 18 U.S.C. § 1028A(a)(1). Thus, section 1028A provides a consecutive two-year mandatory minimum sentence for anyone who commits an enumerated crime while knowingly transferring, possessing, or using another person's means of identification. In stark contrast, the underlying identity fraud crimes upon which section 1028A liability is based do not include the additional element that the means of identification belong to another person. For those crimes it is sufficient that the means of identification be fraudulent.

For example, the identity fraud statute that formed the predicate of Flores-Figueroa's section 1028A conviction was 18 U.S.C. § 1546(a) (enumerated in 18 U.S.C. § 1028A(c)(7)). Although both section 1546(a)[4] and 1546(b)[5] prohibit various

[4] The conduct falling under 18 U.S.C. § 1546(a) includes:

> Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means

immigration-related activities involving fraudulent means of identification, neither requires that the offender have used a means of identification of another person. Similarly, 42 U.S.C. § 408(a) (enumerated in 18 U.S.C. § 1028A(c)(11)), which

> of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or
>
> . . .
>
> Whoever, when applying for an immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or for admission to the United States personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name without disclosing his true identity, or sells or otherwise disposes of, or offers to sell or otherwise dispose of, or utters, such visa, permit, or other document, to any person not authorized by law to receive such document; . . . .

[5] 18 U.S.C. § 1546(b) makes it a crime to use:

> (1) an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor,
>
> (2) an identification document knowing (or having reason to know) that the document is false, or
>
> (3) a false attestation,
>
> for the purpose of satisfying a requirement of section 274A(b) of the Immigration and Nationality Act, shall be fined under this title, imprisoned not more than 5 years, or both.

proscribes a range of social security-related frauds,[6] only requires use of a fraudulent social security

[6] Section 408(a) proscribes, in relevant part:

> Whoever—
>
> . . .
>
> (7) for the purpose of causing an increase in any payment authorized under this subchapter (or any other program financed in whole or in part from Federal funds), or for the purpose of causing a payment under this subchapter (or any such other program) to be made when no payment is authorized hereunder, or for the purpose of obtaining (for himself or any other person) any payment or any other benefit to which he (or such other person) is not entitled, or for the purpose of obtaining anything of value from any person, or for any other purpose
>
> (A) willfully, knowingly, and with intent to deceive, uses a social security account number, assigned by the Commissioner of Social Security (in the exercise of the Commissioner's authority under section 405(c)(2) of this title to establish and maintain records) on the basis of false information furnished to the Commissioner of Social Security by him or by any other person; or
>
> (B) with intent to deceive, falsely represents a number to be the social security account number assigned by the Commissioner of Social Security to him or to another person, when in fact such number is not the social security account number assigned by the Commissioner of Social Security to him or to such other person; or
>
> (C) knowingly alters a social security card issued by the Commissioner of Social Security, buys or sells a card that is, or purports to be, a card so issued, counterfeits a social security card, or possesses a social security card or

number, not the fraudulent use of another's social security number.

Indeed, none of the identity fraud crimes involving false representation of citizenship, naturalization, or alien registration status that are enumerated in section 1028A(c) require use of another person's identity information.[7] Nor is use of

> counterfeit social security card with intent to sell or alter it; or
>
> . . .
>
> shall be guilty of a felony and upon conviction thereof shall be fined under Title 18 or imprisoned for not more than five years, or both.

[7] *See* 18 U.S.C. § 911 (enumerated in 18 U.S.C. § 1028A(c)(2), prohibiting any false representation of U.S. citizenship); 18 U.S.C. § 1015(c) (enumerated in 18 U.S.C. § 1028A(c)(4) and proscribing the "use[] or attempt[ed] . . . use [of] any certificate of arrival, declaration of intention, certificate of naturalization, certificate of citizenship or other documentary evidence of naturalization or of citizenship, or any duplicate or copy thereof, knowing the same to have been procured by fraud or false evidence or without required appearance or hearing of the applicant in court or otherwise unlawfully obtained"); 18 U.S.C. §§ 1423, 1424, 1426 (enumerated in 18 U.S.C. § 1028A(c)(6) and prohibiting various uses of fraudulent citizenship documentation); 18 U.S.C § 1543 (enumerated in 18 U.S.C. § 1028A(c)(7), prohibiting use of fraudulent passports); 8 U.S.C. § 1306(d) (enumerated in 18 U.S.C. § 1028A(c)(9) and providing that "[a]ny person who with unlawful intent photographs, prints, or in any other manner makes, or executes, any engraving, photograph, print, or impression in the likeness of any certificate of alien registration or an alien registration receipt card or any colorable imitation thereof, except when and as authorized under such rules and regulations as may be

another person's identity an element of the enumerated offenses which involve use of false papers to acquire a firearm or in connection with defrauding the United States.[8]

Thus, within the identity fraud scheme, the sole distinguishing characteristic triggering section 1028A's additional two-year mandatory minimum sentence is that the means of identification belong to

prescribed by the Attorney General, shall upon conviction be fined not to exceed $5,000 or be imprisoned not more than five years, or both."); 8 U.S.C. § 1324c(a)(2) (enumerated in 18 U.S.C. § 1028A(c)(10), making it unlawful for any person "knowingly . . . to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this chapter or to obtain a benefit under this chapter [Immigration and Nationality]").

18 U.S.C. § 1544, titled "Misuse of passport," and enumerated in 18 U.S.C. § 1028A(c)(7), proscribes the knowing use or attempted use of another's passport but not the use of an otherwise fraudulent passport. The provision does criminalize non-identity-theft-related conduct, however – specifically the knowing use or attempted use of "any passport in violation of the conditions or restrictions therein contained, or of the rules prescribed pursuant to the laws regulating the issuance of passports." 18 U.S.C. § 1544. Thus, section 1028A ensures that the identity theft-related conduct covered by section 1544 is singled out for additional punishment.

[8] *See* 18 U.S.C. § 922(a)(6) (enumerated in 18 U.S.C. § 1028A(c)(3) and making it unlawful "to furnish or exhibit any false, fictitious, or misrepresented identification," "in connection with the acquisition or attempted acquisition of any firearm or ammunition"); 18 U.S.C. § 1002 (enumerated in 18 U.S.C. § 1028A(c)(4) and prohibiting anyone "knowingly and with intent to defraud the United States, or any agency thereof, [from] possess[ing] any false, altered, forged, or counterfeited writing or document").

another person. In targeting this conduct, it is clear that Congress intended that the two-year mandatory minimum be an *additional* punishment. Not only does section 1028A(b) mandate that the two-year sentence run consecutively to the sentence for the underlying crime, but it also prohibits a sentencing court from reducing the sentence for the underlying crime to take into account the mandatory 1028A sentence. 18 U.S.C. § 1028A(b)(2), (3). Congress's imposition of an inflexible and consecutive additional punishment highlights the severity of the punishment. *See* Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 192 (1993) (noting that the purpose of congressionally enacted mandatory minimum sentences "was to deter – through the prospect of certain and lengthy prison terms"); Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25, 67 (2005) (criticizing mandatory minimum sentences as "heavy-handed" punishment that do not take into account an "offender's personal background, the facts of his case, and all other details"); Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 208 (1993) ("When [mandatory minimum sentences] are actually applied to all fact situations falling within their scope, predictable and severe sentences are achieved.").

As previously explained, the only textual addition made by section 1028A as compared with the underlying enumerated crimes is that section 1028A requires that the means of identification be of another person. In order for the mandatory additional two years of incarceration imposed by the statute to have any relationship to culpability, the statute is best construed as directed towards those individuals who intentionally steal another's identity. There is a marked distinction in culpability between the "transfer[ ], possess[ion], or use[ ]" of a means of identification that one knows to belong to another person, as opposed to a means of identification that one only knows to be fraudulent. The knowing use of another's identity quintessentially constitutes theft. Indeed, one can infer a greater likelihood of malice or intent to benefit at the expense of the person to whom the identification rightfully belongs. It is this more culpable conduct that is the target of section 1028A's increased punishment. As the D.C. Circuit observed,

> there is a salient difference between theft and accidental misappropriation. . . . But "theft" is precisely what Congress targeted when it passed section 1028A(a)(1). Because Congress intended to express "the moral condemnation of the community," by enhancing penalties for thieves who steal identities, we hold that section 1028A(a)(1)'s mens rea requirement extends to the "[a]ggravated identity theft" statute's defining element – that

> the means of identification used belongs to another person.

United States v. Villanueva-Sotelo, 515 F.3d 1234, 1246 (D.C. Cir. 2008) (quoting *United States v. Bass*, 404 U.S. 336, 348 (1971)), *petition for cert. filed*, 77 U.S.L.W. 3308 (U.S. Nov. 7, 2008) (No. 08-622); *see also United States v. Hairup*, 565 F. Supp. 2d 1309, 1313 (D. Utah 2008) ("Given the legislative history's repeated references to the concern for the growing number of intentional identity thefts caused in large part by modern technology, this kind of mandatory additional punishment is understandable. And in those cases of actual intended theft of another's identity, the punishment seems to fit the concern. A criminal receives an extra two years in prison if when committing a crime he steals someone else's identity.").

Indeed, the notion that "theft" involves a heightened degree of wrongful intent is well accepted. Historically, "theft" or "larceny" has been a specific-intent crime: "The actor who takes and carries away the personal property of another must do so with the specific intent to deprive the other of the property on a permanent basis. Sometimes this *mens rea* is described . . . as 'the intent to steal,' 'felonious intent' or by the Latin words, '*animus furandi*.'" JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 32.02 [A], at 593 (4th ed. 2006). As this Court has noted, "[s]tate courts of last resort, on whom fall the heaviest burden of interpreting criminal law in this country, have consistently retained the requirement of intent in larceny-type offenses." *Morissette*, 342 U.S. at 260-61; *see also* 50

Am. Jur. 2d *Larceny* § 37 (2008) ("The animus furandi, or intent to steal, is an essential element of the crime of larceny at common law, and under many larceny and theft statutes . . . . More is required than the intent to do an unlawful act; there must be an intent to steal." (footnotes omitted)); Frank O. Bowman, III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 5, 15 (2001) ("[T]he mental state necessary to almost all simple theft-type crimes is some variant of an intent to steal, defraud, or otherwise deprive the owner of the use or benefit of his property."); Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 428 (1993) ("[I]ntent to steal . . . is the traditional mens rea of theft."). It is this additional culpability – the intent to steal – that separates identity theft from identity fraud and warrants the additional punishment set forth in section 1028A.

In fact, the legislative history surrounding section 1028A demonstrates that Congress was focused on the more culpable conduct of intentional theft of others' identities and not on accidental misappropriation. Passed as part of the Identity Theft Penalty Enhancement Act, Pub. L. No. 108-275, 118 Stat. 831 (2004) ("ITPEA"), the accompanying House Judiciary Committee Report makes clear that it was Congress's intent to "punish 'identity *thieves*' who '*steal* identities to commit terrorist acts, immigration violations, firearms offenses, and other serious crimes.'" *Villanueva-Sotelo*, 515 F.3d at 1244 (emphasis in original)

(quoting H.R. Rep. No. 108-528 at 3 (2004), as reprinted in 2004 U.S.C.C.A.N. 779, 780). The Report's description of identity theft focuses on intentional stealing, explaining that "identity thieves":

> obtain[] individuals['] personal information for misuse not only through "dumpster diving," but also through accessing information that was originally collected for an authorized purpose. The information is accessed either by employees of the company or of a third party that is authorized to access the accounts in the normal course of business, or by outside individuals who hack into computers or steal paperwork likely to contain personal information.

H.R. Rep. No. 108-528, at 4-5 (2004) as reprinted in 2004 U.S.C.C.A.N. 779, 780-81. As the Report makes clear, Congress's aim was to punish and deter more effectively the most culpable offenders – those who knowingly steal others' identities in order to commit serious crimes. *Id.* at 3, 2004 U.S.C.C.A.N. at 779 ("Currently under 18 U.S.C. § 1028 many identity thieves receive short terms of imprisonment or probation; after their release, many of these thieves will go on to use false identities to commit much more serious crimes."); *id.* at 5, 2004 U.S.C.C.A.N. at 781 ("Under current law, many perpetrators of identity theft receive little or no prison time. That has become a tacit encouragement to those arrested to continue to pursue such crimes."). The report goes

on to list a number of cases in which identity thieves received relatively light sentences. In each of these cases, the defendants knew that the identity information used actually belonged to someone else. *Id.* at 5-6, 2004 U.S.C.C.A.N. at 781-82.

Statements made during floor debate were similarly focused on knowing theft. Representative Sensenbrenner, the chair of the House Judiciary Committee, stated that "[t]his legislation will allow prosecutors to identify thieves who steal an identity, sometimes hundreds or even thousands of identities, for purposes of committing one or more crimes." 150 CONG. REC. H4809 (daily ed. June 23, 2004). Even in the immigration context, Congress's sole focus remained the same. For example, Representative Carter, the lead sponsor of the Act, explained that it would "facilitate the prosecution of criminals who steal identities in order to commit felonies" and gave as an example a case where a "Texas driver's license bureau clerk pleaded guilty to selling ID cards to illegal immigrants using stolen information from immigration papers." *Id.* at H4810; *see also Villaneueva-Sotelo*, 515 F.3d at 1244 ("Focusing on the immigration context, the [House] report mentions a case in which a Mexican resident obtained federal benefits by using 'the name and Social Security number of his former brother-in-law, a U.S. citizen.'" (quoting H.R. Rep. 108-528 at 6, 2004 U.S.C.C.A.N. at 781)). In reviewing the legislative record of the Act, the D.C. Circuit noted that at no point did any member of Congress "so much as allude to a situation in which a defendant wrongfully obtain[ed] another person's personal information

unknowingly, unwittingly, and without intent." *Villanueva-Sotelo*, 515 F.3d at 1245 (internal quotation marks omitted) (alteration in original).

Thus, both the structure of the statutory scheme and the statute's legislative history reveal that Congress, by targeting "aggravated identity theft," singled out for additional punishment those defendants who knew they were using not only a means of identification that did not belong to them but indeed that it belonged to someone else.[9] These are the more serious offenders who are subject to greater punishment. Rather than reflecting an intention to depart from the established principle that punishment should be calibrated to culpability, section 1028A is best interpreted as embracing it.

II. The Government's Reading of the Aggravated Identity Theft Provision Contravenes the Principle That the Degree of Punishment Generally Should Reflect the Level of Culpability and Leads to Disparate Sentencing Results.

The interpretation of 18 U.S.C. § 1028A(a)(1) offered by the Government and adopted by the Eighth Circuit, ignores the basic precept of criminal justice discussed herein. According to the Government, the additional two-year mandatory minimum applies regardless of whether an

[9] The Department of Justice has also viewed intentional misappropriation of another's identity as the touchstone of identity theft. *See* http://www.usdoj.gov/criminal/fraud/websites/idtheft.html (providing examples of identity theft, all of which involve an intention to steal another person's identifying information).

individual knows that a means of identification belongs to another person. Rather than calibrating punishment to the degree of culpability, under this reading, punishment is decoupled from culpability; offenders with similar degrees of culpability are to be punished differently while offenders with different degrees of culpability are to be punished similarly. This reading leads to unwarranted and unreasonable results.

The facts of this and other cases demonstrate the anomalies that the government's interpretation creates. On the one hand, the crime of identity theft targeted by Congress is typified by *United States v. White*, No. 06-4141, 2008 U.S. App. LEXIS 21654 (6th Cir. Oct. 10, 2008). In *White*, the defendant worked with an employee of Capital One to steal the names, addresses, account and social security numbers of more than 50 people holding Capital One credit cards, causing losses over $212,000 to those accounts. For this knowing identity theft, White was convicted and sentenced to 85 months for access device fraud, in violation of 18 U.S.C. § 1029(a)(2), to be followed by section 1028A's two-year consecutive mandatory minimum. *See also, e.g., United States v. Blixt*, 548 F.3d 882 (9th Cir. 2008) (affirming section 1028A conviction of a bank employee who forged her supervisor's signature on hundreds of checks totaling more than $150,000).

Unlike the type of individuals just described, who were plainly targeted by Congress in enacting section 1028A, Petitioner's case typifies the cases of individuals who had no intention to steal someone else's identity. It is undisputed that Flores-Figueroa

used false alien registration and social security numbers in connection with his employment. *See United States v. Flores-Figueroa*, 274 F. App'x. 501 (8th Cir. 2008). Lacking, however, was knowledge that the numbers belonged to someone else. There is no implication therefore of any intent to steal another's identity or indeed to prey on others by so doing as is typically associated with identity theft.

The case *United States v. Bobby Hammond*, pending in the United States Court of Appeals for the Fifth Circuit (No. 08-20320), provides another example of misapplication of aggravated identity theft charges to a defendant who had no intention to steal another person's identity. Hammond was an evacuee of New Orleans after it was devastated by Hurricane Katrina, and was entitled to disaster unemployment assistance funded by the Federal Emergency Management Agency. In order to apply for this assistance, Hammond called one of the centers established by the Louisiana Department of Labor to process such claims. Trial Tr. vol. 1, 178, Oct. 15, 2007, United States v. Hammond, 07-CR-116 (S.D. Tex.). Hammond provided the call center employee with requested information about himself – including his social security number – so that an application could be filled out on his behalf. *Id.* at 148.

Hammond called the assistance call center again when he had not yet received a debit card to collect his benefits. This time, the application created on his behalf misstated the last digit of his social security number: Hammond's social security number ends in 4726; the number on the second application

ends in 4725. *Id.* at 152. The Louisiana Department of Labor erroneously sent Hammond two debit cards – one for each social security number. Over the course of the next six months, Hammond used both cards, receiving 38 payments that totaled $3724 for each card. *Id.* at 161. As it turned out, the social security number ending in 4725 belonged to another New Orleans resident, albeit one who did not apply for assistance. *Id.* at 197-98.

Hammond was subsequently charged with mail fraud, wire fraud, and aggravated identity theft. Trial Tr. vol. 2, 288-300, Oct. 16, 2007. Hammond's defense to the aggravated identity theft charges was that he did not know that the social security number ending in 4725 belonged to someone else. The government conceded that it had no evidence that Hammond knew that he was using another person's social security number. Trial Tr. vol. 1, 126-27. The District Court refused to instruct the jury that the government was required to prove such knowledge. Trial Tr. vol. 2, 274-75.

Hammond was ultimately convicted of both wire fraud and aggravated identity theft in connection with wire fraud. He was sentenced to six months for wire fraud plus the two-year consecutive mandatory minimum for aggravated identity theft. Minute Entry 85, United States v. Bobby Hammond, 07-CR116 (S.D. Tex. May 16, 2008).

Certainly, Hammond knowingly accepted benefits to which he was not entitled. For that offense he was sentenced to serve only six months in prison. He is to serve an additional two years, however, based on

mere happenstance rather than upon the increased culpability that would result from knowingly using another person's identity.

The recent prosecution of undocumented workers at the Agriprocessors Inc., meat packing plant in Postville, Iowa is another stark example of the misapplication of aggravated identity theft charges to defendants who had no knowledge that they were using someone else's identity. On May 12, 2008, immigration enforcement officers arrested more than 300 immigrant workers at Agriprocessors. The majority of these workers were then charged with using Social Security or alien registration numbers that did not belong to them. As it turned out, most of the numbers being used belonged to other persons. Pursuant to Eighth Circuit precedent, however, in order to bring charges under section 1028A prosecutors were not required to – and they did not – allege that the workers using such numbers knew that the numbers belonged to other persons. *See United States v. Mendoza-Gonzalez*, 520 F.3d 912, 916 (8th Cir. 2008). This fact dramatically altered the stakes for those workers who had been using such numbers as compared with the workers using numbers that were simply fake. Facing a credible threat of a mandatory two-year minimum sentence under section 1028A, almost all of the workers who happened to have been using numbers belonging to other persons quickly accepted plea offers to serve five months in prison. By contrast, workers using false numbers that did not belong to anyone else were offered probation. *See* Peter R. Moyers, *Butchering Statutes: The Postville Raid and the*

Misinterpretation of Federal Law, 32 SEATTLE L. R. (forthcoming 2009), *available at* http://papers.ssrn.com. Yet there was no allegation of any difference in the mental state as between one group of workers and another. Happenstance, rather than increased culpability, led to greater punishment for some rather than others.

Individuals such as Flores-Figueroa, Hammond, and the immigration status violators at the Agriprocessors plant undoubtedly committed a crime. Such individuals, however, exhibited less criminal culpability than the "identity thieves" Congress targeted in passing the ITPEA. Yet the government's interpretation treats both categories of offenders identically. As such, defendants with sometimes vastly differing degrees of culpability are punished with equal severity. As the D.C. Circuit observed:

> common sense tells us that a defendant ought not receive two additional years of incarceration for picking one random number rather than another – unless, of course, Congress has made clear that he should. Put another way, it's only common sense to conclude that conviction under an identity theft statute requires actual theft.

Villanueva-Sotelo, 515 F.3d at 1249; *see also United States v. Sanchez*, No. 08-CR-0017 (CPS), 2008 U.S. Dist. LEXIS 35460, at *15 (E.D.N.Y. Apr. 30, 2008) (concluding that it does not "seem entirely just or effective to subject a defendant to two years

additional imprisonment for a circumstance (the fact that the false name chosen happened to belong to an actual person) over which the defendant has little control"); *Hairup*, 565 F. Supp. 2d at 1313 ("It is one thing to send a person to prison for an extra two years for intentionally using another person's identity while passing a fraudulent check and another to subject a person to the same punishment where there was no such intent."). Here, there is no indication that Congress sought to punish or reward mere chance. Rather, every indication is that Congress – in accordance with firmly established criminal justice principles – sought to impose additional punishment for increased culpability.

Finally, it is important to note that adopting the interpretation urged here will not indemnify the conduct at issue. Even without the additional sentence for aggravated identity theft, Flores-Figueroa must still serve a 51-month sentence. Other defendants who "transfer[ ], possess[ ], or use[ ]" fraudulent means of identification, not knowing them to belong to another person, will continue to be punished under the appropriate document fraud provision applicable to their conduct. Correctly read, however, the aggravated felony provision with its "knowing" element and the correspondingly greater punishment imposed by the statute, should only be applied where the increased level of evil intent is present to justify the additional mandatory minimum sentence enhancement.

CONCLUSION

For the foregoing reasons, the decision of the Eighth Circuit that 18 U.S.C. § 1028A(a)(1) does not require proof of knowledge that a means of identification belongs to another person, should be reversed.

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APPENDIX

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AMICUS CURIAE BRIEF

114

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IGNACIO CARLOS FLORES-FIGUEROA,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

Brief of Professors of Linguistics as Amici Curiae in Support of Neither Party

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Contents

Table of Authorities ii

Interest of Amici Curiae 1

Relevant Statutory Provisions 1

Introduction and Summary of Argument 2

Argument 4

A. In § 1028A(a)(1), *knowingly* modifies the predicate consisting of the verbs and their direct object. 4

B. The phrase *of another person* is part of the verbs' direct object and is therefore part of the predicate that *knowingly* modifies. 10

C. The disputed language in § 1028A is not grammatically ambiguous. 15

D. Although § 1028A(a)(1) is not grammatically ambiguous, it might be possible to find a semantic ambiguity, but only if one looks hard enough and knows what to look for. 21

Conclusion 29

Appendices

Appendix A: List of amici curiae 1a

Appendix B: Text of the definition of a "means of identification" 3a

Appendix C: Additional example sentences 5a

Table of Authorities

Cases

Arthur Andersen LLP v. United States,
544 U.S. 696 (2005) 23
Bryan v. United States,
524 U.S. 184 (1998) 24
Dixon v. United States,
548 U.S. 1 (2006) 23
Liparota v. United States,
471 U.S. 419 (1985) 3, 15, 16, 19
Morissette v. United States,
342 U.S. 246 (1951) 22, 23
Staples v. United States,
511 U.S. 600 (1994) 7, 24
United States v. Godin,
534 F.3d 51 (1st Cir. 2008) 4, 16
United States v. Guillen-Perez,
2007 WL 1455823 (N.D. Fla. 2007) 15
United States v. Hayes,
No. 07-608 (U.S argued Nov. 10, 2008) 1
United States v. Hurtado,
508 F.3d 603 (11th Cir. 2007) (per curiam),
cert. denied, 128 S. Ct. 2903 (2008) 4, 14
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Chemical Corp.,
402 U.S. 558 (1971) 24
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520 F.3d 912, 915 (8th Cir. 2008), *pet. for cert.*
filed, No. 08-5316 (U.S. July 15, 2008) 4, 14
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Interest of Amici Curiae[1]

Amici Thomas Ernst, PhD.; Georgia M. Green, PhD.; Jeffrey P. Kaplan, PhD.; and Sally McConnell-Ginet, PhD. are professors of linguistics. Their credentials are summarized in Appendix A. Professors Green and Kaplan were amici in *United States v. Hayes*,[2] which was recently argued before this Court. As in *Hayes*, linguistics can offer insights and analytical tools that may be helpful in resolving that the interpretive dispute this case presents.

We take no position on the ultimate legal question before the Court. Instead, we focus solely on questions relating to the ordinary meaning of the statutory language, by which we mean the way that the statute is likely to be understood by an ordinary native speaker of English.

Relevant Statutory Provisions

18 U.S.C. § 1028A(a)(1) provides:

> Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment

1. No party's counsel authored this brief in whole or in part. No monetary contribution intended to fund the preparation or submission of this brief was made by any party or any party's counsel. Nobody other than amici or their counsel has made any such contribution. Letters evidencing the parties' consent to the filing of this brief have been lodged with the Clerk. Counsel for amici notes that he informally assisted counsel for the defendant in *United States v. Villanueva-Sotelo*, 515 F.3d 1234 (D.C. Cir. 2008), *pet. for cert. filed* (U.S. Nov 7, 2008) (No. 08-622), in connection with opposing the government's motion in the court of appeals for rehearing en banc.

2. No. 07-608 (U.S argued Nov. 10, 2008).

provided for such felony, be sentenced to a term of imprisonment of 2 years.

18 U.S.C. § 1028(d)(7), which defines the term *means of identification*, is set out in Appendix B.

Introduction and Summary of Argument

Viewed from the standpoint of language rather than law, this case raises questions about what adverbs do and how they work. That subject is much broader and more complicated than most people could imagine; the discussion of adverbs and similar modifiers in the leading reference work on English grammar takes up almost 150 pages.[3] What most of us were taught about the topic in school barely scratches the surface. As a result, the courts that have previously considered how to interpret 18 U.S.C. § 1028A(a)(1) have made several fundamental mistakes.

First, it is a mistake to say that *knowingly* modifies only the statute's verbs. Rather, it modifies the entire predicate consisting of the verbs and their direct object. This is immediately apparent when one looks real-world sentences in which *knowingly* is used. And that empirical evidence is consistent with linguistic theory. The way that *knowingly* contributes to a sentence's meaning is to attribute to one of the actors in the sentence's cast of characters a mental attitude toward the event that the sentence is about. When the verb is transitive, as is the case here, the verb by itself is insufficient to describe the event; the description is incomplete without the direct object. So *knowingly* combines with (and

3. Rodney Huddleston & Geoffrey Pullum, *The Cambridge Grammar of the English Language* 570–95, 665–784(2002).

therefore modifies) the predicate as a whole, not just the verbs.

Second, it is a mistake to say that *knowingly* modifies *transfers, possesses, or uses...a means of identification* but not *transfers, possesses, or uses...a means of identification of another person*. What it modifies is the predicate in its entirety. The prepositional phrase *of another person* is part of the direct object (*a means of identification of another person*), so it is part of the predicate and is therefore part of what *knowingly* modifies.

Third, it is a mistake to say that there is any ambiguity as to what *knowingly* modifies. Although the first two mistakes were made by courts that have ruled against defendants, this one has been made by courts that have ruled in defendants' favor, and it represents these courts' response to the argument that *knowingly* plainly does not modify *of another person*. The courts that have described the statute's grammar as ambiguous have relied on this Court's decision in *Liparota v. United States*,[4] where the Court found a grammatical ambiguity in a statute that is said to be structured similarly to § 1028A(a)(1). But the two structures differ from one another in a crucial respect. So while the statute in *Liparota* was in fact grammatically ambiguous, the statute here is not.

However, that does not end our inquiry. The fact that § 1028A(a)(1) is not ambiguous in its grammatical structure does not rule out the possibility that it is ambiguous in another respect. We therefore conclude this brief by discussing the possibility that despite its unambiguous structure, the statute could be read to allow conviction without proof that the defendant knew

4. 471 U.S. 419 (1985).

that the means of identification belonged to another person. Although we are unable to answer that question definitively, we suggest that if § 1028A(a)(1) is ambiguous, the ambiguity may well be one that exists as a theoretical matter but that plays no role in the everyday process of using and understanding language.

Argument

A. In § 1028A(a)(1), *knowingly* modifies the predicate consisting of the verbs and their direct object.

Several courts, including the Eighth Circuit in this case, have said that as used in § 1028A(a)(1), *knowingly* modifies only the verbs: *transfers*, *possesses*, and *uses*.[5] Indeed, that premise was accepted even by two of the circuits that held against the government, although they ultimately thought the grammatical point not to be decisive.[6]

This notion of what *knowingly* modifies is based on the traditional conception of adverbs, which sees them as modifiers of verbs.[7] But that view oversimplifies matters greatly, and cannot adequately explain how

5. *E.g.*, *United States v. Mendoza-Gonzalez*, 520 F.3d 912, 915 (8th Cir. 2008), *pet. for cert. filed*, No. 08-5316 (U.S. July 15, 2008); *United States v. Hurtado*, 508 F.3d 603 (11th Cir. 2007) (per curiam), *cert. denied*, 128 S. Ct. 2903 (2008); *United States v. Montejo*, 442 F.3d 213, 215 (4th Cir. 2006).

6. *Villanueva-Sotelo*, 515 F.3d at 1239; *United States v. Godin*, 534 F.3d 51, 56 (1st Cir. 2008).

7. *See, e.g.*, Peter Bullions, *Principles of English Grammar* 65, 117 (1871); Richard Palmer, *The Good Grammar Guide* 58–60 (2003). Even in linguistics, adverbs are sometimes described this way in general discussions or introductory texts. *E.g.*, *The Cambridge Grammar of the English Language*, *supra* note 3, at 526; Robert D. Van Valin, *An Introduction to Syntax* 7 (2001).

adverbs such as *knowingly* actually function in a sentence. The fact is that the scope of such an adverb extends not only to the verb but also to the predicate that the verb is part of.[8]

1. The suggestion that *knowingly* modifies only the verbs does not square with the facts of ordinary English usage. Consider a situation in which someone who keeps kosher eats food she thinks is kosher but that actually contains pork. If adverbs really modified verbs but not their direct objects, this person could be said not only to have knowingly eaten, but to have knowingly eaten pork. But it is hard to believe that anybody would accept the latter statement to be true; on the contrary, they would say that the person had eaten the pork UNknowingly.[9]

Or consider the real-life sentences in the following examples, which were found using Google searches:

(1) "[B]eginning January 1, 2007, every Colorado employer will be required to affirm, within twenty days after hiring a new employee, that...it has not knowingly hired an unauthorized alien."[10]

(2) "U.S. Sen. Ted Stevens, R-Alaska, Tuesday said he 'never knowingly submitted' a false disclosure form, despite being indicted."[11]

8. *See, e.g.*, *The Cambridge Grammar of the English Language*, *supra* note 3, at 576.

9. *See, e.g.*, Appendix C, examples 1, 2, 5 & 7.

10. Perkins Coie, *New Colorado Immigration Laws: What Employers Need to Know* (Sept. 29, 2006), http://www.perkinscoie.com/news/pubs_Detail.aspx?publication=98c92fb3-ccc4-113a-9e0a-8abddf64467b&RSS=true.

11. United Press International, *Stevens 'never knowingly' filed false form* (July 29, 2008), available at http://www.upi.com/Top

If it were correct to say that adverbs modify only verbs, these sentences would be nonsensical. Sentence (1) would mean that Colorado employers must affirm that they have not knowingly hired (anyone). And (2) would mean that Stevens denied having knowingly submitted (anything). But that is not what these statements mean, and the reason is that *knowingly* modifies more than just the verbs.[12]

2. This pattern of usage is consistent with linguistic theory. *Knowingly* belongs to the class of adverbs that attribute to one of the actors referred to in the sentence (usually the actor referred to by the subject) a particular mental attitude toward the event that the sentence describes.[13] Thus, the sentence *George knowingly used a*

_News/2008/07/29/Stevens_never_knowingly_filed_false_form/UPI-20641217367160/.

12. For additional examples illustrating the point, see Appendix C.

13. *See, e.g.*, Thomas Ernst, *The Syntax of Adjuncts* 9–10, 54–69 (2002); Paul H. Portner, *What is Meaning?* 69–72 (2005); Adam Zachary Wyner, *Subject-Oriented Verbs are Thematically Dependent*, in *Events and Grammar* 333, 333 (Susan Rothstein, ed. 1998). While some analyses do not characterize adverbs of this type as describing the actor's attitude toward an underlying event, the differences in approach are not significant for purposes of this discussion. In some cases the differences are merely matters of terminology or theoretical nuance. *See, e.g.*, *The Cambridge Grammar of the English Language*, *supra* note 3, at 676–79 (referring to "acts" rather than "events"); Donald Davidson, *The Logical Form of Action Sentences*, in *The Logic of Decision and Action* (Nicholas Rescher, ed. 1967) (proposing a formalization such as "'It was intentional of x that p' where 'x' names the agent, and 'p' is a sentence that says the agent did something.") (reprinted in Donald Davidson, *Essays on Actions & Events* 105, 121–22 (1980)). In other cases, the analysis is consistent with ours in that it treats the adverb as modifying a predicate, not just a verb. *E.g.*, Guglielmo Cinque, *Adverbs and Functional Heads: A Cross-Linguistic Perspective*

hammer describes an event consisting of George using a hammer, and it indicates that George knew he was using a hammer.[14] This category of adverbs plays an important role in the law because it includes the mens-rea adverbs such as *intentionally*, *deliberately*, and *willfully*.

Events involve participants: entities (including inanimate objects and even intangibles) that play a role in the event.[15] In *George knowingly used a hammer*, there are two participants: George, who is the user, and the hammer, which is the thing being used. If one or more of the participants is left out of the sentence, the description of the event will be incomplete, as will the sentence itself. This is shown by (3) (the asterisks indicate that the sentence is ungrammatical).

(3) a. * George knowingly used.
b. * Knowingly used a hammer.

Another way of putting this is to say that in a sentence having a transitive main verb, the direct object is necessary to complete the predicate and is therefore essential to the sentence's meaning.[16]

(1999); Sally McConnell-Ginet, *Adverbs and Logical Form: A Linguistically Realistic Theory*, 58 Language 144 (1982).

14. *See, e.g.*, Clark D. Cunningham, Judith N. Levi, Georgia M. Green & Jeffrey P. Kaplan, *Plain Meaning and Hard Cases*, 103 Yale L.J. 1561, 1576 (1994), *cited with approval in Staples v. United States*, 511 U.S. 600, 623 (1994) (Ginsburg, J., concurring in the judgment).

15. *See, e.g.*, *The Cambridge Grammar of the English Language*, *supra* note 3, at 228–233; Terence Parsons, *Events in the Semantics of English* Ch. 5 (1990); Gennaro Chierchia & Sally McConnell-Ginet, *Meaning and Grammar: An Introduction to Semantics* 472–80 (2d ed. 2000).

16. Some verbs can switch back and forth between transitive and intransitive uses:

Indeed, the relationship between a verb and its direct object is such that the object can influence what the verb is taken to mean, as shown in (4) and (5).[17]

(4) a. throw a baseball
b. throw support behind a candidate
c. throw a boxing match
d. throw a party

(5) a. set the table

(a) 1. They ate dinner with us.
2. He always makes a mess when he eats.
(b) 1. Susan read the newspaper quickly.
2. Every night I read for half an hour before I go to bed.

See, e.g., *The Cambridge Grammar of the English Language*, *supra* note 3, at 300–05. But when such a verb is used intransitively, it is intransitive in its syntax but not its semantics. Even without a direct object, the sentence is understood to describe an event that involves the same two types of participants as in the variant that includes a direct object. Thus, the sentence in (a2) is understood to mean *He always makes a mess when he eats food*.

This is possible only because the information that the missing direct object would provide is understood based on the meaning of the verb: "[T]he verb in this variant is understood to have as object something that qualifies as a typical object of the verb." Beth Levin, *English Verb Classes and Alternations* 33 (1993). But *transfer*, *possess*, and *use* don't work the same way, because there is no typical event-type to fall back on as a default if there is no direct object. This means that they require direct objects, except in narrow circumstances in which the missing information can be inferred from the context (for example, in the context of drug addiction, the use of *using* to mean *using drugs*). *See The Cambridge Grammar of the English Language*, *supra* note 3, at 246; Thomas Herbst et al., *A Valency Dictionary of English* 914 (2004); D.J. Allerton, *Valency and the English Verb* 68–70 (1982).

17. Alec Marantz, *On the Nature of Grammatical Relations* 25 (1984).

b. set a broken bone
c. set sail
d. set a watch

In these examples, each event being described is different in kind from all the others. In (4) the events are, respectively, (a) causing a baseball to move by holding it in one's hand, moving one's arm in a certain way, and releasing it; (b) stating a political preference; (c) deliberately losing a sporting event; and (d) calling people together for a social event. In (5) they are (a) putting silverware and dishes on a table; (b) putting a cast or similar device on a part of someone's body; (c) embarking on a voyage by boat; and (d) adjusting a timepiece.

The three verbs used in § 1028A—*transfer*, *possess*, and *use* are all similarly chameleon-like. The action involved in transferring or possessing a social security card is very different from the action involved in transferring or possessing a car, and both of those actions are very different from the action involved in transferring or possessing real property. And the different types of actions to which the word *use* can be applied are even more varied: using a social security number, using a can opener, using drugs, using the internet, using a telescope, using a bulldozer, using a gun, using electricity, using influence, using restraint, using an opportunity, using a recipe. In each of these cases, the nature of the event described by the predicate is a function, not of the verb alone, but of the verb's interaction with its direct object.

In short, the predicate of a sentence is not only a grammatical unit, it is an integrated unit of meaning. And an adverb such as *knowingly* operates on that unit as a whole.

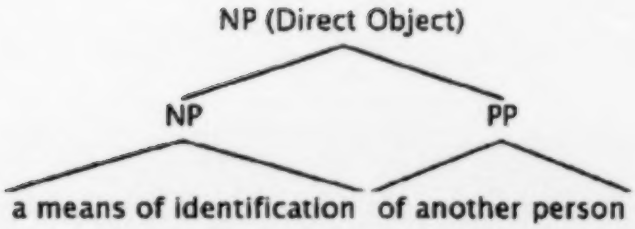
B. The phrase *of another person* is part of the verbs' direct object and is therefore part of the predicate that *knowingly* modifies.

1. From the proposition that *knowingly* modifies an entire predicate, we move on to the question of identifying what the predicate here comprises. It includes, of course, *a means of identification*, which is the direct object of *transfers, possesses, or uses* or rather, is PART of the direct object. The full direct object is the noun phrase *a means of identification of another person*, which consists of a noun phrase (*a means of identification*) modified by a prepositional phrase (*of another person*). This is shown visually in (6).[18]

18. Technically, the prepositional phrase is a complement of *means of identification*, not a modifier. However, we refer to it as a modifier because that usage will be more familiar to the Court and because the difference in terminology is irrelevant to the point we are making. Elsewhere in the brief we will similarly depart from customary linguistic terminology and notation when doing so will simplify the discussion.

We should note here that the structure we have assigned to *a means of identification of another person* differs from the structure described by some courts, in which *of another person* is treated as modifying *identification* rather than *a means of identification*. *E.g.*, *Villanueva-Sotelo*, 515 F.3d at 1238. Although the latter structure would be possible in theory, it is ruled out here for two reasons. First, it does not correspond to what everyone agrees is the intended interpretation of the phrase: 'another person's means of identification.' Rather, it would correspond to the interpretation, 'a means of identifying another person.' Second, *means of identification* has a very specific statutory definition, 18 U.S.C. § 1028(d)(7) (Appendix B hereto). The phrase therefore acts as a stand-in for the list of items in that definition. That function would best be reflected by taking *of another person* to modify *means of identification* as a whole rather than to modify the individual word *identification*.

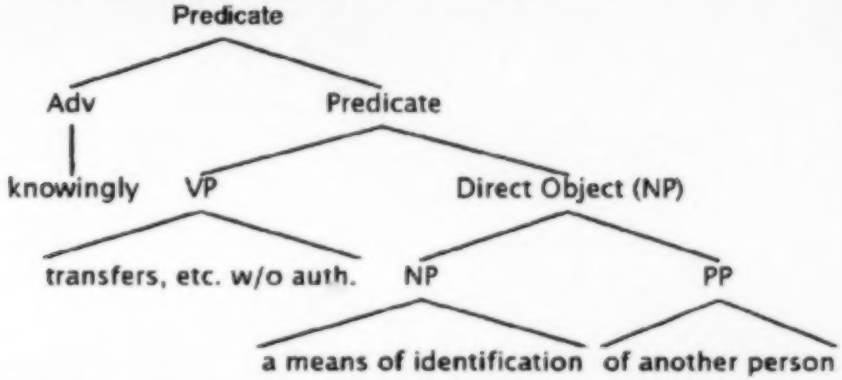
(6)



The fact that *of another person* is part of the direct object is a matter of substance, not just grammatical form. The prepositional phrase combines with the noun phrase to form a larger unit of meaning (much like a verb combines with its direct object to form a larger unit of meaning). Thus, what triggers the application of § 1028A(a)(1) is not simply the unauthorized transfer, possession, or use of a means of identification, but the unauthorized transfer, possession, or use of a means of identification OF ANOTHER PERSON.

This multipart phrase interacts with the verbs, and with the larger predicate, as a single unit:

(7)



As this diagram shows, *of another person* has the same structural relationship to *knowingly* that *a means of identification* does. This means that if *a means of identification* is within the scope of *knowingly*, so is *of another person*.

That conclusion is also supported by the way that *knowingly* is actually used and understood. Consider the sentences in (8)– (11):

(8) "National security adviser Condoleezza Rice, while expressing support for Tenet, said Friday that the CIA had cleared the speech 'in its entirety.' [¶] 'The president did not knowingly say anything that we knew to be false,' she said, en route to Uganda, one stop on Bush's Africa trip."[19]

(9) "'We're extremely disappointed that our institution has been cast in a negative light as a result of our men's basketball scheduling practices the past three years,' Pollard said. 'I honestly believe that Iowa State University did not knowingly do anything wrong as it relates to scheduling these non-conference games.'"[20]

(10) "In the past, Mr. Hamilton has asserted that he did not knowingly do anything illegal and that the contributions advanced the teamsters' goal to help restore Democrats' control of Congress."[21]

(11) [From an administrative decision in a liquor-license proceeding:] "Fat Tuesday [the licensee] did not knowingly allow the purchase of beer by a person under the age of twenty-one...."[22]

19. Cable News Network, *Tenet admits error in approving Bush speech*, CNN.com (Dec. 25, 2003), http://www.cnn.com/2003/ALLPOLITICS/07/11/sprj.irq.wmdspeech/.

20. Associated Press, *Iowa State to drop scheduling company after report* (March 16, 2006), http://sports.espn.go.com/ncb/news/story?id=2370829.

21. Steven Greenhouse, *Hoffa Gets Clearance to Run, Creating Teamsters Face-Off*, New York Times, April 28, 1998, A1 at A16.

22. Final Order and Decision, *South Carolina Department of Revenue v. Andrew J. Freese, d/b/a Fat Tuesday*, 97-ALJ-17-0507-CC (S.C. Admin. Law Ct. Dec. 31, 1997), http://www.scalc.net/decisions.aspx?q=4&id=6432.

In each example, *knowingly* appears in a context that is grammatically almost identical to that in § 1028A(a)(1): it modifies a verb phrase in which the direct object consists of a noun that is modified by a phrase that follows it. And in each excerpt, the sentence makes sense only if *knowingly* is understood to include the modifier in its scope. Thus, in (8), Dr. Rice was not asserting that the president had not knowingly said anything at all. Similarly, in (9) and (10), Mr. Pollard was not asserting that Iowa State had not knowingly done anything at all, and the New York Times was not reporting that Mr. Hamilton had made any similar claim as to his own conduct. And in (11), the ALJ presumably was not suggesting that the holder of the liquor license had not knowingly allowed the purchase of beer by anyone at all.

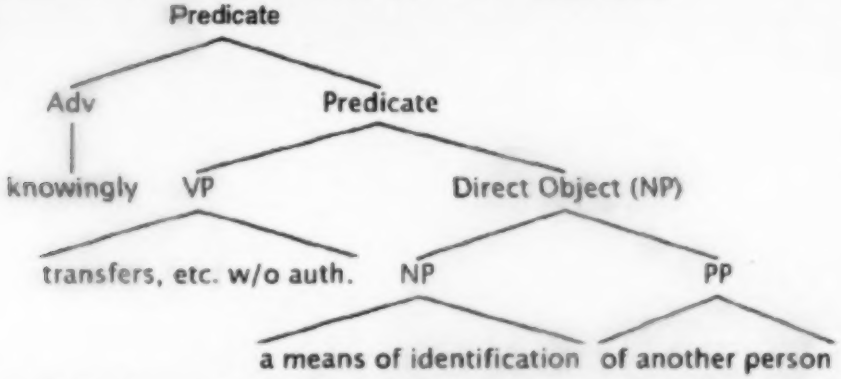
We have previously said that an adverb such as *knowingly* is understood as describing a specified person's state of mind with respect to the underlying event described in the sentence. The examples in (8)–(11), and the additional examples in Appendix C, show that one's understanding of this state of mind is sensitive to the way the event is described in the sentence. For example, the event in (11) is not simply an event of allowing the purchase of beer, but an event of allowing the purchase of beer by someone under 21. The adverb *knowingly* is understood as describing the licensee's state of mind with respect to an aspect of that more narrowly specified event: the purchaser's age.

This phenomenon is not unique to our examples; rather, one would expect to see the same thing wherever *knowingly* is used. So while the interpretation of our examples does not dictate how §1028A(a)(1) would be understood, there is every reason to believe that the statute would be understood in the same way.

2. In concluding that *knowingly* modifies only the verbs *transfers*, *possesses*, and *uses*, the Eight Circuit (following the Fourth and the Eleventh) reasoned that "'[g]ood usage requires that the limiting modifier...be as close as possible to the words which it modifies'"; thus, the placement of *knowingly* immediately before the verbs was taken to indicate "'that "knowingly" modifies those verbs, not the later language in the statute.'"[23] Even if one accepts the Eighth Circuit's view of what good usage requires, the court's conclusion does not follow from its premise.

The scope of an adverb (or adverbial phrase) is not governed solely by its linear position in the sentence. A sentence is not simply a string of words arranged in a particular order; it has a hierarchical structure in which words are grouped into phrases and phrases are grouped into larger phrases.[24] This is shown by the tree-diagram in (7), which we repeat here as (12):

(12)



Thus, while *knowingly* immediately precedes the verbs, it also immediately precedes the entire predicate

23. *Mendoza-Gonzalez*, 520 F.3d at 915 (quoting *Montejo*, 442 F.3d at 215, and *Hurtado*, 508 F.3d at 609).

24. *See, e.g.*, Andrew Carnie, *Constituent Structure* Ch. 2 (2008); *The Cambridge Grammar of the English Language*, *supra* note 3, at 20–21.

transfers, possesses, or uses, without lawful authority, a means of identification of another person.

For a further indication that significance of linear proximity is limited, consider the fact that *knowingly* is preceded in § 1028A(a)(1) by another adverbial: the prepositional phrase *during and in relation to any felony violation enumerated in subsection(c)*[.] This phrase has (correctly) been understood to modify the entire predicate *knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person*. In other words, the unauthorized transfer, possession, or use of another person's means of identification is covered by § 1028A only if it occurs during and in relation to one of the specified predicate offenses.[25] What is significant here is that *of another person* is within the scope of the *during-and-in-relation-to* phrase even though the latter phrase is farther from *of another person* than *knowingly* is.

C. The disputed language in § 1028A is not grammatically ambiguous.

Our discussion so far has been consistent with Petitioner's position and with the conclusion reached by the D.C., First, and Ninth Circuits. However we disagree with those courts on one point. They have described § 1028A(a)(1) as being structurally similar to the statute involved in *Liparota v. United States*[26] and

25. *See, e.g., United States v. Occident*, 243 Fed. Appx. 777, 778 (4th Cir. 2007); *United States v. Guillen-Perez*, 2007 WL 1455823 at *1 (N.D. Fla. 2007); *United States v. Johnson*, 2006 WL 156712 at *1 (E.D. Mo. 2006). The language of the indictment in this case was consistent with this understanding. (Indictment at 2–3, *United States v. Flores-Figueroa*, No. 07-cr-515 (S.D. Iowa Feb. 15, 2007) (Dkt. No. 10).)

26. 471 U.S. 419 (1985).

therefore as being ambiguous; we believe that the two statutes differ from one another in a crucial respect. While this disagreement does not necessarily affect the ultimate outcome here, we believe that in order to avoid analytical confusion, the Court should understand how and why the two statutes differ.

Like this case, *Liparota* dealt with whether a statutory mens rea requirement applied to a particular element of the crime. The statute in *Liparota* provided, "[W]hoever knowingly uses, transfers, acquired, alters, or possesses coupons or authorization cards in any manner not authorized by [law] shall [be punished.]"[27] In considering this language, the Court said, "'As a matter of grammar the statute is ambiguous; it is not at all clear how far the sentence the word "knowingly" is intended to travel.'"[28] Each of the courts of appeals that has held § 1028A(a)(1) to be ambiguous quoted this statement in support of its conclusion.[29]

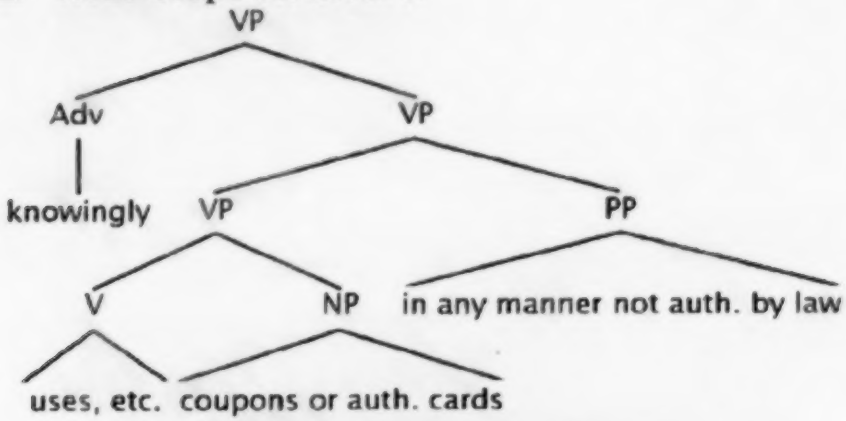
The statute in *Liparota* was in fact ambiguous with respect to the scope of *knowingly*. Specifically, two different phrase structures were possible, one of which would give *knowingly* a wide scope (meaning that the government must prove that defendant knew that his use of the coupons was unauthorized) and the other of which would give it a narrow scope (meaning that such proof would be unnecessary). These two possible structures are shown in (13).

27. 7 U.S.C. § 2024(b)(1) (1977).

28. 471 U.S. at 424 n.7 (quoting Wayne LaFave & Austin Scott, *Criminal Law* § 27 (1972)).

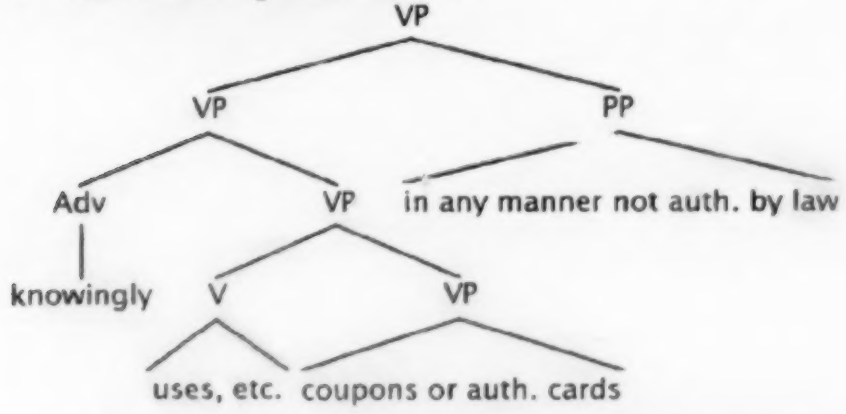
29. *United States v. Miranda-Lopez*, 532 F.3d 1034, 1038 (9th Cir. 2008); *Godin*, 534 F.3d at 58; *Villanueva-Sotelo*, 515 F.3d at 1241.

(13) a. Wide-scope structure:



= 'uses, transfers, acquires, alters, or possesses coupons or authorization cards in a manner not authorized by law, and does so knowingly'

b. Narrow-scope structure:

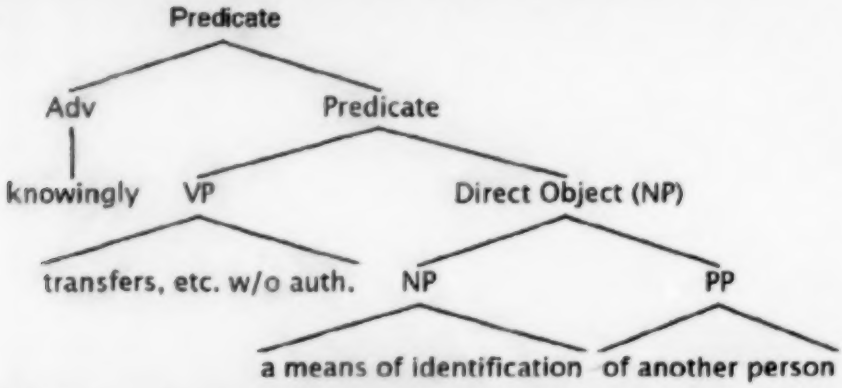


= 'knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards, and does so in a manner not authorized by law'

Note that in each structure, the prepositional phrase *in any manner not authorized by law* combines with a verb phrase and acts adverbially by specifying the manner in which the action in question is performed.

In § 1028A(a)(1), on the other hand, there is only one way in which *of another person* can be integrated into the statutory language. And that is to be combined with *a means of identification* and thereby become part of the direct object of *transfers, possesses, or uses*.

(14)

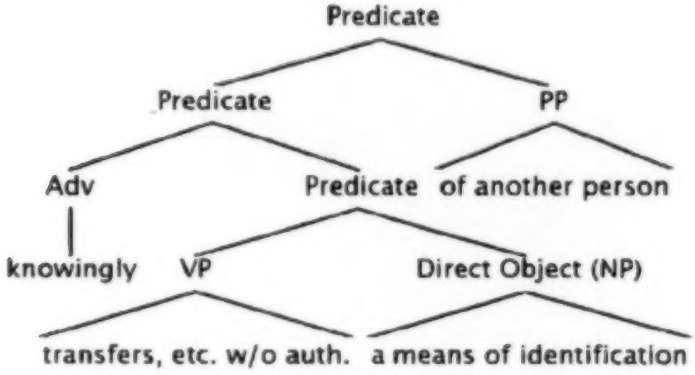


This is the only structure that reflects an aspect of the statute's meaning on which everyone seems to agree: that the act prohibited by § 1028A(a)(1) (putting aside the question of mens rea) is the unauthorized use of ANOTHER PERSON'S means of identification. In order to encode the relationship of possession or belonging between the other person (the possessor) and the means of identification (what is possessed), the phrase *another person* has to be joined with the phrase *a means of identification*. Doing this requires some syntactic glue, which is provided here by the preposition *of*.[30] Thus, the grammatical structure helps to generate the intended meaning.

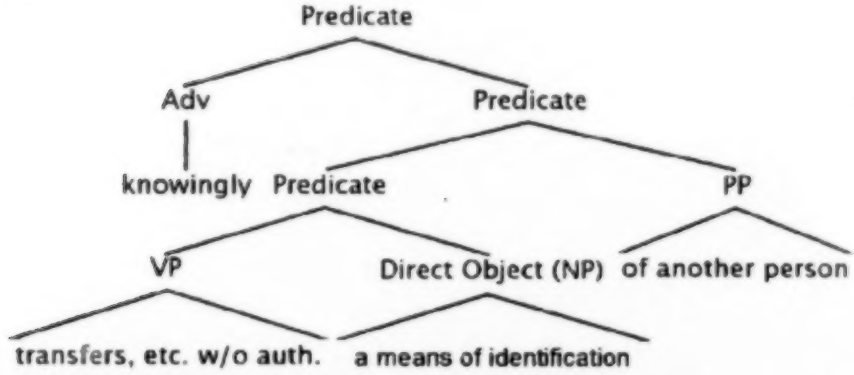
30. *See The Cambridge Grammar of the English Language*, *supra* note 3, at 658; Chris Barker, *Possessives and relational nouns* 6 (draft Aug. 30, 2008), to appear in *Semantics: An International Handbook of Natural Language Meaning* (Claudia Maienborn et al., eds.), *available at* http://barker.linguistics.fas.nyu.edu/Stuff/barker-possessives.pdf.

Unlike the statute in *Liparota*, there is no feasible alternative structure here. The only possibilities would be for *of another person* to adjoin directly to one of the verb phrases, as shown in (15).

(15) a.



b.



But neither of those structures would generate the interpretation adopted by the Eighth Circuit.

Indeed, it is not clear that either one would generate a coherent meaning at all. The problem is that in these structures, *of another person* is forced against its will to function adverbially, since it is combined with a verb phrase. That is not a function it can perform, even under duress.

This is shown by (16) and (17), which represent our attempt to construct sentences in which *of another person* can only be understood as being combined directly

with a verb phrase. The result in each example is something that is not merely ungrammatical, but is so bizarre that fully deciphering it is virtually impossible (hence the exclamation points in addition to the asterisks).

(16) *! The defendant possessed of another person a means of identification that he had gotten from someone who sold fake IDs.

(17) Q: What was the defendant charged with doing with the means of identification?

A: *! Possessing it of another person.
*! Transferring it of another person.
*! Using it of another person.

In each example, one is forced to interpret *of another person* as being combined with the verb phrase because the only other option combining it with the verb's direct object is ruled out. It is ruled out in (16) because *of another person* does not fall into the small category of noun-phrase modifiers that can appear at the beginning of the phrase. It is ruled out in (17) because *of another person* does not fall into the even smaller category of noun-phrase modifiers that can appear after a pronoun.[31] But the results of combining it with the verb phrase are also grossly unacceptable. This is a matter of trying to force a square peg into a round hole, and it confirms that there is no alternative structure that could create a *Liparota*-style ambiguity.

31. *See The Cambridge Grammar of the English Language*, *supra* note 3, at 429–30, 433–39.

D. Although § 1028A(a)(1) is not grammatically ambiguous, it might be possible to find a semantic ambiguity, but only if one looks hard enough and knows what to look for.

Despite the absence of any grammatical ambiguity, there remains a question as to whether § 1028A(a)(1) is ambiguous in a different respect. This possible ambiguity arises from a distinction, little known outside of linguistics and philosophy, between two types of interpretations. Although the distinction can be described in a variety of different ways; we will describe the two types of interpretations as interpretations *de dicto* ("about what is said") and interpretations *de re* ("about the thing").[32]

1. The distinction between interpretations *de dicto* and interpretations *de re* arises with respect to certain kinds of statements, among which are "propositional attitude reports."[33] These are statements reporting a person's mental attitude toward something, such as *Lois Lane thinks Clark Kent can fly*. We will use that

32. *See, e.g.*, David Crystal, *A Dictionary of Linguistics and Phonetics* 124–25 (5th ed. 2003); Thomas McKay & Michael Nelson, *The De Re/De Dicto Distinction* in *Stanford Encyclopedia of Philosophy* (2005), http://plato.stanford.edu/entries/prop-attitude-reports/dere.html. For discussions of the distinction in the legal literature, see Jill C. Anderson, *Just Semantics: The Lost Readings of the Americans with Disabilities Act*, 117 Yale L.J. 992, 1007–22 (2008), and Robert E. Rodes, Jr., *De Re and De Dicto*, 73 Notre Dame L. Rev. 627 (1998).

    At least one of the amici thinks that it would be preferable to say *opaque* instead of *de dicto* and *transparent* instead of *de re*.

33. *See generally, e.g.*, Thomas McKay & Michael Nelson, *Propositional Attitude Reports* in *Stanford Encyclopedia of Philosophy* (2005 rev.), http://plato.stanford.edu/entries/prop-attitude-reports/index.html.

statement as an example to illustrate the distinction between the two readings.

On the *de dicto* reading, *Lois Lane thinks Clark Kent can fly* is understood as describing Lois's belief in a way that she would accept as being accurate. It is therefore roughly equivalent to *Lois Lane believes the following proposition: Clark Kent can fly*. On that reading, the statement is false.[34] On the *de re* reading, however, the statement is understood as describing Lois's beliefs from the point of view of a speaker who knows what Lois doesn't: that Clark is really Superman. So on this reading, the statement could be paraphrased as *Lois Lane believes there is a specific person who can fly (Superman), and whether Lois knows it or not, that person is one and the same as Clark Kent*. Understood in this way, the statement is true, regardless of Lois's subjective opinion of Clark.

Although our focus here is on language rather than law, it might be helpful in explaining the distinction between *de dicto* and *de re* to show the distinction in action by using it as a lens through which to look at the Court's prior decisions holding *knowingly* applicable to a particular statutory element.

In almost all of these cases, the Court's holding was consistent with a *de dicto* interpretation of the statute. Take *Morissette v. United States*.[35] The Court there dealt with a statute that prohibited "knowingly convert[ing] to [one's] own use...any...thing of value of the United States."[36] The court of appeals had affirmed Moris-

34. More specifically, it's false if one is talking about what Lois thought before she learned Superman's secret identity.

35. 342 U.S. 246 (1951).

36. 18 U.S.C. § 641.

sette's conviction based on a *de re* reading of the statute: Morissette had knowingly taken property, and whether he knew it or not, that property belonged to the United States. But this Court held that the conviction was invalid unless Morissette was found to have "had knowledge of the facts...that made the taking a conversion."[37] The Court elaborated on this conclusion: "[I]t is not apparent how Morissette could have knowingly or intentionally converted property that he did not know could be converted, as would be the case ...if he truly believed it to be abandoned and unwanted property."[38] Both the result and the reasoning are consistent only with a *de dicto* reading of the statute, because the Court required the act of conversion to be viewed from the defendant's perspective rather from the perspective of an observer who knew facts that the defendant was unaware of.

So, too, with respect to *Liparota*,[39] *Dixon v. United States*,[40] *Arthur Andersen LLP v. United States*,[41] *United*

37. 342 U.S. at 270–71.

38. *Id.* at 271.

39. 471 U.S. at 425–28 (statute prohibited knowingly dealing with food stamps in a manner not authorized by law; conviction requires proof that defendant knew that his dealings were unauthorized).

40. 548 U.S. 1, 5–6 (2006) (statute prohibited knowingly making false statements in connection with purchase of firearms; government has burden of proving that defendant "knew she was making false statements in connection with the acquisition of firearms").

41. 544 U.S. 696, 705–06 (2005) (statute prohibited "knowingly... corruptly persuad[ing] another person" to withhold or destroy evidence; conviction requires proof that defendant was conscious of wrongdoing).

States v. X-Citement Video, Inc.,[42] and *Staples v. United States*.[43] In each case, the Court required proof that when the defendant allegedly committed the crime, he knew the facts necessary to satisfy each element that *knowingly* applied to.[44] As in *Morissette*, this is consistent only with a *de dicto* interpretation.

The only exceptions to this pattern are cases such as *United States v. International Minerals & Chemical Corp.*,[45] which involved a statute making it a crime to knowingly violate ICC regulations. The Court held there that the government did not have to prove that the defendant was aware of the regulation. This amounts to a *de re* interpretation because the act is viewed from the perspective, not of the defendant, of an observer who knows the law. In these cases, the Court may have relied at least in part on a factor extrinsic to the statutory language: the principle that ignorance of the law is no excuse.[46]

42. 513 U.S. 64 (1994) (statute prohibited knowingly transporting a visual depiction in interstate commerce if the depiction is of a minor engaging in sexually explicit conduct; conviction requires proof that defendant knew that the depiction fell into that category).

43. 511 U.S. 600, 608–16 (1994) (statute prohibited unregistered possession of certain types of weapons; conviction requires proof that defendant knew the weapon had the specified characteristics) (dealing with implicit rather than explicit mens rea requirement); *see also id.* at 622–23 (Ginsburg, J., concurring in the judgment).

44. *See also Bryan v. United States*, 524 U.S. 184, 192–93 (1998) (discussing prior cases).

45. 402 U.S. 558 (1971).

46. *International Minerals & Chemical Corp.*, 402 U.S. at 562.

2. With respect to § 1028A(a)(1), a *de dicto* interpretation would require proof that the defendant knew (a) that he was transferring, possessing, or using a means of identification and (b) that the means of identification belonged to another person. A *de re* interpretation, on the other hand, would require proof only that the defendant knowingly did some act, and that whether the defendant knew it or not, the act amounted to transferring, possessing, or using another person's means of identification.

Although the *de re* reading would support the Eighth Circuit's interpretation, it would go further than the Eighth Circuit (or any other court) seems to have gone, in that the government would not have to prove that the defendant knew that what he transferred, possessed, or used was a means of identification. Thus, under the *de re* reading, the statute would reach cases in which the defendant gave someone a sealed envelope that (unbeknownst to the defendant) contained a stolen social security card.[47] The government has so far not advocated such an interpretation; indeed, it has argued against it.[48] The question therefore arises whether § 1028A(a)(1) can be understood a way that combines the two types of interpretations, such that *a means of identification* is read *de dicto* while *of another person* is read *de re*.

47. *Cf.* Pet. Br. 24–25.

48. *See* Gov't Br. at 11–12 n.8, *Villanueva-Sotelo*, No. 07-3055 (D.C. Cir. filed June 20, 2007) (arguing that the statute requires proof that the defendant knew that what he transferred, possessed, or used was a means of identification). *See also Villanueva-Sotelo*, 515 F.3d at 1258 (Henderson, J., dissenting) (arguing that § 1028A's scienter requirement "is satisfied if the defendant knows that he possesses a 'means of identification' 'without lawful authority'").

Unfortunately, there is no clear answer. In fact, the question may well be unanswerable. We say this because any set of facts that would satisfy the half-and-half reading would also satisfy the full *de re* reading. In other words, any time (18) is true, (19) would be true as well.

(18) The defendant knowingly transferred, possessed, or used a means of identification, and whether he knew it or not the means of identification belonged to another person.

(19) The defendant knowingly performed an act, and whether he knew it or not the act constituted transferring, possessing, or using a means of identification of another person.

This means that if someone understood the statute to authorize Petitioner's conviction in this case, there would be no immediately apparent way to tell whether that understanding was attributable to the half-and-half reading or to the full *de re* reading. While there might be some way to make that determination, we do not know what it is.

Nevertheless, suppose that a half-and-half interpretation is theoretically possible, so that a linguist or philosopher could view § 1028A(a)(1) as being ambiguous. Would that necessarily mean that there was an ambiguity that anyone else would perceive in the course of everyday reading, writing, or conversation?

It would not. One of the amazing things about language is that it is successfully used to communicate despite being pervasively ambiguous.[49] Words often have

49. *See, e.g.*, Thomas Wasow et al., *The Puzzle of Ambiguity* in *Morphology and the Web of Grammar* 265 (O. Orgun & P. Sells, eds. 2005), available in manuscript for at http://www.stanford.edu/~wasow/Lapointe.pdf.

multiple meanings and can belong to more than one grammatical category. Sentences can have more than one grammatical structure. And so on. But the vast majority of these ambiguities fly under the radar and are never noticed.

For example, when someone tells us that they're going to the bank, we don't ask them, *Which kind of bank do you mean—the place where you get money or the side of a river?* When we read a sentence like *Ron and Amy got married and had children*, we take it for granted that they married each other and that the marriage preceded the children, even though neither conclusion is compelled by the literal language.

This case may present such a situation. There is a good chance that if § 1028A(a)(1) is ambiguous, the ambiguity is resolved automatically, below the level of consciousness. When we read the statute as native speakers of English, rather than as linguists, it seems unambiguous. The possibility that there might be a *de re* interpretation came up only after we consciously focused on the issue of *de dicto* versus *de re* interpretations. And at least one of the amici doesn't think that a *de re* interpretation is even possible.

It is, of course, possible that our intuitions on these points are atypical. But there is some reason to think that they are not. To begin with, one would expect that the members of a language community would exhibit substantial and widespread variation in their understanding of particular sentences, for if such variation existed one would expect to see evidence of it in the form of corresponding difficulties in communication.

Moreover, while it is common for *knowingly* and other mental-attitude adverbs (or negated forms of them) to be used to express a *de dicto* meaning (as in (20), (21), and the examples in Appendix C), we have

been unable to find any examples in which they are seem to be used to express a *de re* meaning.

(20) "In the case of Hoyte vs. Yum! Brands, Inc., filed in June of 2006 in the Superior Court of the District of Columbia, the plaintiff was a retired medical doctor from Maryland who alleged he unknowingly consumed food fried in trans-fats at KFC restaurants."[50] [On a *de re* reading, this statement would mean that the doctor did not know that he was consuming food.]

(21) "Around one in 25 dads could unknowingly be raising another man's child, new research suggests."[51] [On a *de re* reading, this statement would mean that 1 out of 25 fathers did not know that he was raising a child.]

Of course, this isn't conclusive, by any means. But if real-world usage is overwhelmingly weighted toward *de dicto* interpretations, that fact would be hard to dismiss as irrelevant.

One final point. The fact the government's interpretation of § 1028A(a)(1) has been accepted by several courts does not indicate that the statute is ambiguous as a matter of ordinary English usage and comprehension. None of those decisions provides a valid data-point on that issue, because none of them resulted from the sort of spontaneous and unselfconscious interpretive process that underlies our ability to understand language. Rather, each decision was based on the

50. Mike Petrie, Comment posted Dec. 26, 2007 to David Henderson, *An Edible Quest* on BoomerCafe (Dec. 24, 2007), http://www.boomercafe.com/2007/12/24/an-edible-quest/.

51. *One in 25 dads could unknowingly be raising another man's child, researchers find*, World Science (Aug. 12, 2005), http://www.world-science.net/othernews/050812_dadsfrm.htm.

conscious application of what the court thought was a rule of grammar. Given that those supposed rules were spurious, there is no reason to pay attention to the results that the application of those rules generated.

Conclusion

For these reasons, the Court should interpret the language of § 1028A consistently with our analysis.

Respectfully submitted,

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APPENDIX

Appendix A
Amici Curiae

Thomas Ernst, PhD. is a currently visiting professor of linguistics at Dartmouth College, and beginning in January 2009 he will return to his position as visiting scholar at the University of Massachusetts, Amherst. His interests include syntactic and semantic theory, the syntax and semantics of adverbs, and phrase structure theory. His book on adverbs, *The Syntax of Adjuncts*, was published by Cambridge University Press in 2002.

Georgia M. Green, PhD. is Professor, emerita, of linguistics at the University of Illinois at Urbana-Champaign and Professor, emerita, Beckman Institute. Her research interests include pragmatics, syntactic theory, and language and the law. A partial list of her publications can be found at <http://www.linguistics.uiuc.edu/g-green/>.

Jeffrey P. Kaplan, PhD., J.D. is Professor of linguistics and Chair of the Department of Linguistics and Oriental Languages at San Diego State University. His research interests include discourse-functional syntax; pragmatics; and language and law, in particular, applying principles of grammar, semantics, pragmatics, and discourse structure to legal discourses such as contracts, legislation, wills, and other operative texts. His cv is available at <http://www-rohan.sdsu.edu/~jeff315/JK_CV_2007.html>.

Sally McConnell-Ginet, PhD. is Professor, emerita, of linguistics at Cornell University. Her research interests include on the one hand, formal models of natual-language meaning, including the relation between syntactic structures and semantic interpretation, and on the other, the interaction of language with the social

and cultural contexts in which it is used. Dr. McConnell-Ginet has done work on the semantics of adverbs. She was president of the Linguistic Society of America in 2006 and became a Fellow of that organization in January 2008. She will become a fellow of the American Academy for the Advancement of Science in January 2009. A partial list of her publications can be found at <http://ling.cornell.edu/index.cfm/page/people/mcconell_ginet.htm>.

Appendix B
Text of the definition of a "means of identification"

18 U.S.C. § 1028:

...

(d) In this section and section 1028A—

...

(7) the term "means of identification" means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any

(A) name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;

(B) unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

(C) unique electronic identification number, address, or routing code; or

(D) telecommunication identifying information or access device (as defined in section 1029(e));

...

...

Appendix C
Additional Example Sentences

(1) "In populations in which pork ingestion is proscribed for religious or other reasons, trichinellosis associated with pork ingestion has been rare or non-existent. Nevertheless, outbreaks have been described, in which such populations unknowingly ingested pork. Examples are outbreaks involving hundreds of cases in southern Lebanon, associated with ingestion of ground meat dishes traditionally prepared with lamb but for which pork was substituted."[1]

(2) "Public awareness of sulfite sensitivity became prominent in the early 1980s, when there were fatalities and near-fatalities relating to acute asthma attacks after asthmatics unknowingly ingested sulfite-treated produce in restaurants."[2]

(3) "A prominent Virginia Democrat announced legislation Friday that would fine merchants who knowingly sell defective, recalled toys and would ban their use in day care facilities next year....The main problem is that retailers are unknowingly, not deliberately, selling the unsafe toys, he said. How-

1. Peter M. Schantz & Vance Dietz, *Trichenellosis*, in *Principles and Practice of Clinical Parasitology* 521, 526 (Stephen H. Gillespie & Richard D. Pearson, eds. 2001).

2. Susan S. Teuber, *Foods, Additives, and Nonsteroidal Anti-Inflammatory Drugs in Asthma*, in *Bronchial Asthma* 315, 325 (M. Eric Gershwin & Georges M. Halpern, eds. 1994).

ever, the fines would target those that sell products although they know they have been recalled."[3]

(4) "Dogs, especially puppies were a common occurrence in the 48th and the 390th. Something to do with the fact that U.S. servicemen did not knowingly eat dogs."[4]

(5) "Residents did not knowingly drink sewage-contaminated water, but that is what flowed from faucets in hundreds of homes in the central Louisiana town of Pineville for more than two months."[5]

(6) "Although SmallCap Corporate Partners Inc. does not knowingly publish false information, SmallCap Corporate Partners Inc. does not guarantee the accuracy or completeness of any information represented on this web site or in its publications."[6]

3. Dan Genz, *Bill would fine retailers who knowingly sell defective toys*, The Examiner, Dec. 25, 2007 (internal paragraphing deleted), available at http://www.examiner.com/a-1122837~Bill_would_fine_retailers_who_knowingly_sell_defective_toys.html.

4. Al Bruss, *Puppies and Sunsets May66*, on 390th TC, http://www.390tc.com/6604_Puppies.htm.

5. Cable News Network, *Lawsuits follow after sewage found in Louisiana town's water taps*, CNN.com (March 23, 2000), http://archives.cnn.com/2000/US/05/23/drinking.sewage/.

6. SmallCap Corporate Partners Inc., *Disclosure of Compensation and Interest*, http://www.smallcap.ca/SmallCapDisclosure.htm.

(7) "Tap water is always chlorinated to kill germs and bacteria. We need chlorine but we need not drink the chlorine inside the water. Moreover, there are heavy metals, other contaminants, possible toxins that one is not aware of. In the process of washing, cleansing, cooking and drinking, many have unknowingly consumed dirtied water that might be cancer-causing in the long run."[7]

(8) "Maricopa County Attorney Rick Romley defended his prosecution of Ray Krone by saying there was 'strong circumstantial evidence' of his guilt. In response to the conclusive proof that an innocent Ray Krone spent 10-1/2 years in prison, four of which was spent on Arizona's death row, Prosecutor Romley said, 'we will try to do better.' He neglected to mention that the prosecution's concealment of the odontologist's report that cast doubt on Ray's guilt prior to his first trial indicates they may have knowingly prosecuted an innocent man."[8]

(9) "The world's richest art institution knowingly bought scores of archaeological treasures looted

7. Lucy Wong Moi, *12 Cancer-Causing "Elements" Found In Our Home!*, EzineArticles.com (Mar. 9, 2007), http://ezinearticles.com/?12-Cancer-Causing-Elements-Found-In-Our-Home!&id=482473>.

8. Hans Sherrer, *Twice Wrongly Convicted of Murder—Ray Krone Is Set Free After 10 Years*, 2 *Justice Denied Magazine* no. 9, available at http://forejustice.org/wc/ray_krone_JD_vol2_i9.htm.

from Italy, it has been alleged. Despite being warned as far back as 1985 that dealers were selling stolen goods, the Getty Museum in Los Angeles continued to buy them.... According to the Los Angeles Times, which has obtained hundreds of pages of memos, purchase agreements and correspondence records from the museum in Malibu, high-ranking staff were complicit or simply turned a blind eye to the plundering of the priceless antiquities."[9]

(10) "Knowingly being in the company of anyone who is using illegal drugs is prohibited."[10]

(11) "Although the cost of printing and distributing 20,000 copies of the paper free each week is considerable, the Herald does not simply accept advertising for the sake of money. Advertisers are always investigated fully; the Herald does not knowingly publish ads for businesses involved in illegal activities."[11]

9. Barbara McMahon, *Getty Museum knowingly bought archaeological treasures stolen from Italy, investigation claims*, The Guardian, September 27, 2005 (internal paragraphing deleted), available at http://www.guardian.co.uk/world/2005/sep/27/usa.arts.

10. Northeastern University, *Undergraduate Student Handbook/Planner 2008-2009* at 17 (2008), available at http://www.northeastern.edu/osccr/pdfs/2008-2009_Code.pdf.

11. Shawntaye Hopkins & Katie Hollenkamp, *Letter from the Editor: The Herald is revenue independent from Western; staff screens all ads*, College Heights Herald, Dec. 8, 2005, available at http://media.www.wkuherald.com/media/storage/paper603

ews/2005/12/08/Opinion/Letter.From.The.Editor.The.Herald
.Is.Revenue.Independent.From.Western.Staff.Scre-1124913
.shtml.